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## Editors' Preface & Precedential Opinion Summary

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# VILLANOVA LAW REVIEW

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## Third Circuit Review

### EDITORS' PREFACE

IN 1973, the VILLANOVA LAW REVIEW launched the *Third Circuit Review*, a special compendium within the LAW REVIEW intended to survey precedential opinions issued by the U.S. Court of Appeals for the Third Circuit.<sup>1</sup> In 2018 as we celebrate the *Third Circuit Review*'s 45th anniversary, we use this opportunity to recount the *Third Circuit Review*'s robust history, highlight distinguished contributors, and consider how the *Third Circuit Review* may continue to provide value to our academic and practitioner community.

When launching the *Third Circuit Review*, Volume XIX's editors asked Collins J. Seitz, then Chief Judge for Third Circuit, to write an introduction.<sup>2</sup> Chief Judge Seitz identified a few guiding principles so that editors, by "combining analysis with perspective," could provide maximum value "both to the judiciary and to the law."<sup>3</sup> While Chief Judge Seitz welcomed critical analysis of the court's opinions, his charge to the VILLANOVA LAW REVIEW was not simply for editors to recite the court's facts and holding and analyze its reasoning. Chief Judge Seitz wrote that editors were empowered to broadly contemplate the state of the law and the "particular faults or virtue of each decision" free from practical realities that constrain judicial decision-making.<sup>4</sup> In other words, the *Third Circuit Review* could

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1. See *Forward*, 19 VILL. L. REV. 277 (1973). According to Volume XIX's editors, the Third Circuit at that time was one of the few courts of appeals that did not have "the dubious honor of having its opinions systematically subjected to the well-meant, and, hopefully, studied analysis and criticism of fledgling members of the legal community." *Id.* at 277. We are grateful to our predecessors for having the foresight to position the Villanova Law Review to undertake such a responsibility. We share their goal to further the *Third Circuit Review*'s legacy "in the hope that it will be of benefit to practicing members of the bar, to the bench, and to the academic community." *Id.*

2. *Id.* at 277.

3. See Collins J. Seitz, *Introduction*, 19 VILL. L. REV. 279 (1974); *Forward*, 19 VILL. L. REV. 277 (1973).

4. See *id.* at 280 (identifying practical restraints as "precedent, the contentions of the parties before them, and the state of the record"). Chief Judge Seitz continued:

At the same time, the reviewers must realize that their own mandate is broader than' ours. If a decision is correct, but the statute that controls it

become a beacon of intellectual activity providing authors with space to consider the law not only as it is, but the law as it should be.

Over the years, the structure of the *Third Circuit Review* has evolved considerably. Originally the project was led by a dedicated *Third Circuit Review* Editor and it analyzed opinions by category, focusing on federal matters like admiralty and maritime law, constitutional law, federal jurisdiction and procedure, government regulations, and federal statutes like the Clean Air Act and Title VII of the Civil Rights Act.<sup>5</sup> Members of the bar occasionally contributed, and in 1979, six years after the *Third Circuit Review*'s inaugural edition, editors decided to focus on publishing student works, "both conventional 'casenotes' for reviews of single decisions and more expansive 'mini-comments' and 'comments' for analyses of broader areas of the law."<sup>6</sup>

These casenotes were originally organized by topic.<sup>7</sup> This topical categorization and the *Third Circuit Review* editor position eventually faded away as the *Third Circuit Review* began to feature longer, student-written articles analyzing five or six discrete precedential opinions.<sup>8</sup> Titled case-

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illogical, the reviewers are obligated to bring to light the harmful consequences that should require legislative action. Such "in terrorem" arguments are often made by attorneys to dissuade judges from following admittedly controlling law. It is as proper for law reviews to employ these arguments in calling for legislative change as it would be improper for judges to accede to them in deciding cases. Similarly, law reviews are free to call for the reversal of a precedent that, if made by our court, binds our panel or, if a Supreme Court decision, binds our circuit en banc as well.

*Id.*

5. See, e.g., Various Editors, *Admiralty and Maritime Law*, 19 VILL. L. REV. 281 (1973); Various Editors, *Federal Jurisdiction and Procedure*, 19 VILL. L. REV. 325 (1973); Various Editors, *Federal Jurisdiction and Procedure*, 19 VILL. L. REV. 325 (1973); Various Editors, *Federal Statutes and Government Regulation*, 19 VILL. L. REV. 340 (1973); Kenneth A. Jacobsen, *Administrative Law - Administrative Procedure Act - Standing to Challenge Agency Action Requires a Showing That the Plaintiff Has Suffered Injury in Fact to a Protected Interest from the Face of the Particular Statutory Provision Allegedly Violated, or When Protective Intent Is Clear from Its Legislative History*, 23 VILL. L. REV. 580 (1978); Various Editors, *Criminal Law*, 24 VILL. L. REV. 263 (1979).

6. Dieter G. Struzyna, *Third Circuit Review - Preface*, 24 VILL. L. REV. 193 (1979); see also, e.g., Barbara A. Schneller, *Editor's Preface*, 26 VILL. L. REV. 557 (1981) (retaining student-authored format); Gary A. Rome, *Federal Practice and Procedure - Comment - Appealability and Finality in the Third Circuit - Is the United States Supreme Court More Appealing Than the Third Circuit*, 25 VILL. L. REV. 884 (1980).

7. See, e.g., Various Editors, *Miscellaneous*, 26 VILL. L. REV. 861 (1981); Various Editors, *Constitutional Law*, 27 VILL. L. REV. 616 (1982); Anne P. Stark, *Editor's Preface*, 27 VILL. L. REV. 595 (1982).

8. See Frances M. Visco, *Editor's Preface*, 28 VILL. L. REV. 649 (1983) (explaining that length of student-written work has increased); see also Carolyn J. Warter, *Civil Rights - Title VI - The Exhaustion of Administrative Remedies Is Not a Prerequisite to a Private Right of Action under Title VI*, 28 VILL. L. REV. 693 (1983); Esther L. Bachrach, *Materiality of Misrepresentations Made on Visa Applications in Light of Current Congressional Policy*, 31 VILL. L. REV. 1046 (1986); Mary J. Mullany, *Health Law - Provider Challenge to State Medicaid Reimbursement Plan*, 37 VILL. L. REV. 1081 (1992); Christine M. Kovan, *Disability Law - Susquenita School District v. Raelee S., Pendent Place-*

notes or casebriefs, these student articles often combined critical legal analysis with practical advice for litigating attorneys.<sup>9</sup>

Despite the focus on publishing student pieces, articles submitted by nonstudent authors were occasionally included in various issues.<sup>10</sup> In 1997, for example, the *Third Circuit Review* published a "Report of the Third Circuit Task Force on Equal Treatment in the Courts," authored by the Commission on Gender and the Commission on Race & Ethnicity.<sup>11</sup>

Additionally, numerous judges have contributed to the *Third Circuit Review* throughout its history.<sup>12</sup> United States Supreme Court Justice William J. Brennan wrote the introduction to the 1974-1975 issue to honor Albert Branson Mars, a jurist who served on the Third Circuit, as well as the Emergency Court of Appeals and as a district judge.<sup>13</sup> Justice Brennan reprised his role in the 1976-1977 issue by authoring a dedication to Third Circuit Judge John Biggs, Jr.<sup>14</sup>

In 1983, the *Third Circuit Review* was dedicated to William H. Hastie, a former Governor of the Virgin Islands and Third Circuit Judge and Chief Judge Seitz authored an honorary introduction.<sup>15</sup>

In 1983, Chief Judge Seitz reprised his role to evaluate the *Third Circuit Review's* purpose in celebration of its 10th anniversary.<sup>16</sup> He en-

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ment and Financial Responsibility under the Individuals with Disabilities Education Act: *The Third Circuit's Extension of Burlington*, 42 VILL. L. REV. 1867 (1997).

9. See, e.g., Anna M. Maloney, *Semerenco v. Cendant Corp.: The Third Circuit Clarifies the Securities Exchange Commission's Rule 10b-5 in the Context of Public Misrepresentations*, 47 VILL. L. REV. 1171 (2002); Anthony D. Foti, *Could Jesus Serve on a Jury - Not in the Third Circuit: Religion-Based Peremptory Challenges in United States v. Dejesus and Bronshtein v. Horn*, 51 VILL. L. REV. 1057 (2006); Brian J. Boyle, *Bright-Line Rules and Inefficient Markets: The Third Circuit's 10b-5 Materiality Doctrine is Ripe for Revision*, 57 VILL. L. REV. 683 (2012); Carina M. Meleca, *An "Officer" and a [Gold]man: The Third Circuit Finds Ambiguous Corporate Titles Jeopardize Right to Advancement Under Delaware Law in Aleynikov v. Goldman Sachs Group, Inc.*, 60 VILL. L. REV. 781 (2015). The first casebrief appears to have been published in 1993. Robert Ebby, *Constitutional Law - When Does Guilty of Third Degree Murder Equal Not Guilty by Reason of Insanity*, 38 VILL. L. REV. 1153 (1993). Additionally, when the VILLANOVA LAW REVIEW launched *Tolle Lege* in 2012, casenotes analyzing Third Circuit opinions were also published online. See, e.g., Douglas A. Behrens, *Blinded by the Light: The Third Circuit Curtails the Independent Ricci Defense in NAACP v. North Hudson Regional Fire & Rescue*, 58 VILL. L. REV. TOLLE LEGE 1 (2012).

10. See, e.g., Gerald Seipp, *Third Circuit's New Role as Activist Court on Immigration Issues*, 51 VILL. L. REV. 981 (2006).

11. *Report of the Third Circuit Task Force on Equal Treatment in the Courts*, 42 VILL. L. REV. 1355 (1997).

12. Indeed, in 1981, editors began publishing the list of judges currently serving on the circuit; a practice that remained until 1998. See, e.g., Various Editors, *Judges of the Court/Table of Cases*, 26 VILL. L. REV. 558 (1981); Various Editors, *Judges of the Court/Table of Cases*, 27 VILL. L. REV. 596 (1982).

13. See William J. Brennan Jr., *Dedication to Albert Branson Maris*, 20 VILL. L. REV. 403 (1974).

14. William J. Brennan Jr., *Third Circuit Review: Dedication*, 22 VILL. L. REV. 579 (1976).

15. Collins J. Seitz, *Dedication to William H. Hastie*, 21 VILL. L. REV. 431 (1976).

16. Collins J. Seitz, *Introduction*, 28 VILL. L. REV. 651 (1983).

couraged editors to scrutinize the *Third Circuit Review's* utility and purposefully consider “every aspect of its editorial process, from the selection of the topics or opinions it will explore to the legal analysis it offers its readers.”<sup>17</sup> He encouraged editors to avoid simply picking cases for the mere fact that they lend themselves to criticism, and instead focus on the in-depth, probing legal analysis that presents the facts of a case fairly and objectively analyzes the court’s proposition.<sup>18</sup>

The next judicial introduction came from Third Circuit Judge Ruggero J. Aldisert in 1985.<sup>19</sup> He provided the following suggestion to “increase the quality of professional criticism”:

If opinion writing is a fine art, writing a criticism is an even finer one. First, it is essential that the analyst pinpoint the exact legal dispute between the parties. Second, if the critic casts stones at the opinion writer’s reasoning, the stone thrower should recognize the distinctions among the court’s reasoning process, the weight given to the arguments, and the court’s exercise of value judgment. To implement these suggestions, the critic must fully understand the nature of the judicial decision-making process, as well as the sophisticated structure of “legal reasoning.”<sup>20</sup>

Third Circuit Judge Doloris K. Sloviter echoed many of Judge Aldisert’s points when providing the introduction of the 20th anniversary issue of the *Third Circuit Review* in 1993.<sup>21</sup> She specifically questioned the *Third Circuit Review's* topic selection process, noting the reasons certain cases were chosen to be critiqued were “not always clear.”<sup>22</sup> She nevertheless applauded the topical categorization of student critiques because it allowed “the law review to study the unique culture that each court develops over time.”<sup>23</sup> In that spirit, she suggested the LAW REVIEW undertake greater in-depth analyses over broader areas of the law in addition to retaining the casenote format to analyze specific opinions.<sup>24</sup>

In 1995, Chief Judge Seitz appeared once again in the *Third Circuit Review*, but this time, as the recipient of five tributes honoring his status as a giant within the legal field. Tributes honoring Chief Judge Seitz were authored by United States Supreme Court Chief Justice William Rehn-

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17. *Id.*

18. *Id.*

19. Ruggero J. Aldisert, *Introduction*, 30 VILL. L. REV. 828 (1985).

20. *Id.*

21. Doloris K. Sloviter, *Introduction*, 38 VILL. L. REV. 1089 (1993).

22. *Id.* at 1089–90. (“Some years the Annual Review has featured cases that would be on any objective observer’s list of the most significant recent Third Circuit cases. Surprisingly, other equally, if not more, influential decisions have been overlooked.”).

23. *Id.* at 1090.

24. *Id.* at 1089–90.

quist,<sup>25</sup> United States Supreme Court Associate Justice William J. Brennan, Jr.,<sup>26</sup> Chief Justice of the Delaware Supreme Court E. Norman Veasey,<sup>27</sup> Judge Sloviter,<sup>28</sup> and one of Chief Judge Seitz's former law clerks, Beth Nolan.<sup>29</sup>

The next judicial contribution arrived in 2002, provided by Edward Becker who, at that time, served as Chief Judge for the Third Circuit.<sup>30</sup> Chief Judge Becker's forward provided an overview of the history and practices of appellate mediation within the Third Circuit.<sup>31</sup>

The *Third Circuit Review* last published a judicial author in 2012. In his introduction to the *Third Circuit Review*, Third Circuit Judge D. Michael Fisher illuminated aspects of appellate judging that he contends may not be readily apparent to readers of legal scholarship.<sup>32</sup> Emphasizing the collegial nature of the appellate bench, Judge Fisher explained how judges work together to arrive at a particular ruling and how opinions are circulated among judges before they are ultimately published.<sup>33</sup> He also explained that because the court relies on litigants and their advocates to "identify gaps in the law and present arguments for why and how they should be filled," the court is not well-positioned to opine on "ancillary areas of the law," preferring instead to opine on the issue directly before it.<sup>34</sup>

Reflecting on the contributions made by judges, practitioners, and students, we are grateful that the *Third Circuit Review* has endeavored to sustain a rich body of scholarly analysis. As we continue to move the *Third Circuit Review*'s legacy forward, we are reminded of Chief Judge Seitz's original charge to combine analysis with perspective to provide value to our legal audiences.

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25. William H. Rehnquist, *Tribute to Judge Collins J. Seitz*, 40 VILL. L. REV. 545 (1995).

26. William J. Brennan Jr., *The Courage of Collins Seitz*, 40 VILL. L. REV. 547 (1995).

27. E. N. Veasey, *Collins Jacques Seitz Paradigm of Principle, Passion, Professionalism and Persuasion*, 40 VILL. L. REV. 559 (1995).

28. Dolores K. Sloviter, *Tribute to Collins J. Seitz: A Kind Man*, 40 VILL. L. REV. 553 (1995).

29. Beth Nolan, *Master of the Craft: A Tribute to Collins J. Seitz*, 40 VILL. L. REV. 565 (1995).

30. Edward R. Becker, *Foreword*, 47 VILL. L. REV. 1055 (2002).

31. *Id.*

32. D. M. Fisher, *Issues in the Third Circuit: Introduction*, 57 VILL. L. REV. 675 (2012) ("What I find intriguing in this issue of the Villanova Law Review is its focus on outcomes. That is, the case comments presented here provide insight into the substance of our opinions, but, through no fault of the authors or editors, can offer very little about how we got there. This is not a flaw, but rather a simple reality: the decision-making process of an appellate court is not entirely reflected in the text of an opinion, though the ultimate decision is.").

33. *Id.* at 678.

34. *Id.* at 680.

After speaking with judges, their law clerks, practitioners, and professors, we believe those who tune in to the Third Circuit's decisions would appreciate an effort that contemplates the Third Circuit's jurisprudence in its totality. By an analogy, this effort would provide for the Third Circuit what the *GEORGETOWN LAW JOURNAL'S ANNUAL REVIEW OF CRIMINAL PROCEDURE* provides for the criminal law community.<sup>35</sup> Thus, we are enthusiastic to supplement the *Third Circuit Review's* student-written casebrief model with a new feature titled the "Precedential Opinion Summary."

The Precedential Opinion Summary amalgamates precedential opinions issued over the prior year, publishes their holdings, and provides insight as to how those holdings fit within the broader context of the Third Circuit's jurisprudence. Opinions that either decided issues of first impression, received en banc consideration, or attracted concurring or dissenting opinions are highlighted.

Creating such a summary facilitates five objectives. First, the summary renders a service that no legal resource currently provides by simply housing Third Circuit precedential holdings in one quickly-accessible location.<sup>36</sup> Second, the summary helps scholars ascertain which areas of the law are categorically receiving precedential attention, answering Judge Sloviter's call to pinpoint which legal doctrines remain stagnant and which continue to evolve. Third, by identifying the opinions receiving a concurrence or dissent, the summary identifies principles that remain unresolved internally within the circuit or may subject to further dispute outside of it. Fourth, when practitioners confront unfamiliar legal questions they can use the summary to jumpstart legal research. Fifth, the summary aids those who must track circuit law developments by providing notice of a new or changed rule.<sup>37</sup>

The *Third Circuit Review's* Precedential Opinion Summary also honors the VILLANOVA LAW REVIEW maxim of "Tolle Lege". Translated from Latin

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35. See About the Annual Review of Criminal Procedure, *GEORGETOWN LAW*, <https://www.law.georgetown.edu/georgetown-law-journal/in-print/arcp/> [https://perma.cc/2M7Z-FRDA] (last visited Nov. 15, 2018).

36. This fittingly comports with Villanova Law Library being a long-standing repository of Third Circuit opinions. See Opinions of the United States Court of Appeals for the Third Circuit, Villanova University Charles Widger School of Law, <https://digitalcommons.law.villanova.edu/thirdcircuit/> [https://perma.cc/8BXB-ZTT3] (last visited Nov. 15, 2018) ("As the official backup archive for the United States Court for the Third Circuit, Villanova University School of Law maintains digital copies of all opinions filed by the Court since May of 1994.").

37. For example, consider the value of such notice to jurists and practitioners in routine criminal sentencing. In *United States v. Azcona-Polanco*, 865 F.3d 148 (3d Cir. 2017), the Third Circuit held that when imposing conditions of supervised release upon a deportable immigrant, the district court must "explain and justify" its decision in open court "so that the appellate court is not left to speculate about the reasons." *Id.* at 153 (internal quotation marks and citations omitted). Notice of *Azcona-Polanco's* mandate would be of obvious value to district court judges who must adhere to the Third Circuit's directives when administering sentencing colloquies, as well as to the government and defendants who rely on decisions like *Azcona-Polanco* when preparing for hearings.

to English, *Tolle Lege* means “take up and read.” This phrase honors the Augustinian roots of Villanova University and can be directly traced to St. Augustine’s conversion to Christianity. Upon hearing the instruction to take up and read, Augustine quite literally took up St. Paul’s Letter to the Romans and simply read it. This momentary decision to merely read proved to be life changing for Augustine—and for all those who have subscribed to Augustinian values since.

The VILLANOVA LAW REVIEW and the Third Circuit Precedential Opinion Summary approaches legal scholarship through the lens of *Tolle Lege*—striving to contribute relevant commentary that encourages the legal community to take up and read. By embracing the *Tolle Lege* perspective, we strive to add value to the legal community by challenging students, practitioners, and jurists alike to apply arguments, analysis, and theory in a way that positively impacts our world.<sup>38</sup>

Guided by these objectives and our mandate to survey precedential law within the circuit, the Precedential Opinion Summary takes its maiden voyage in Volume LXIII. While we have set forth the summary’s initial structure, we in no way hope that structure remains stagnant. We encourage future VILLANOVA LAW REVIEW editors to further improve upon the Precedential Opinion Summary’s format so that both the summary and the entire *Third Circuit Review* remain responsive to the needs of the academic and practitioner community. We of course welcome all feedback in this endeavor.

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38. See VILLANOVA UNIVERSITY OFFICE FOR MISSION & MINISTRY, *TOLLE LEGE*, xi (2d ed. 2016), [https://www1.villanova.edu/content/dam/villanova/mission/mandm\\_assets/2016FINALFULLCOVER.pdf](https://www1.villanova.edu/content/dam/villanova/mission/mandm_assets/2016FINALFULLCOVER.pdf) [<https://perma.cc/N9JX-9VWF>]. In 2012, the Villanova Law Review cemented its commitment to the *Tolle Lege* perspective when it introduced its online companion to the traditional print edition—appropriately titled VILLANOVA LAW REVIEW *TOLLE LEGE*. All articles published on the online companion are provided a citation of VILL. L. REV. *TOLLE LEGE*. Since 2012, VILLANOVA LAW REVIEW *TOLLE LEGE* has expanded the Law Review’s ability to contribute scholarship to the legal profession and encourage others to take up and read the knowledge that exists in our world. Students, scholars, attorneys, judges, and even lay individuals need not look any further than the *Tolle Lege* citation itself to propel them in their scholarly endeavors. Several articles providing in depth analysis of Third Circuit decisions can also be found on VILLANOVA LAW REVIEW *TOLLE LEGE*. See, e.g., Robert Turchick, *Is the FTC Playing Fair? The Third Circuit’s Decision in FTC v. Wyndham Worldwide Corp. Furthers Agency’s Data Security Efforts but Creates Tension for Smaller Businesses*, 61 VILL. L. REV. *TOLLE LEGE* 71 (2016); Travis Dunkelberger, *Third Circuit Takes the Wind Out of Frivolous Litigators’ Sails in Fair Wind Sailing, Inc. v. Dempster*, 60 VILL. L. REV. *TOLLE LEGE* 121 (2015); John D’Elia, *Keeping FLSA’s Promises: The Third Circuit Extends the Law’s Reach to More Joint Employers, Successors, and Supervisors in Thompson v. Real Estate Mortgage Network*, 60 VILL. L. REV. *TOLLE LEGE* 93 (2015); Keely Collins, *The Third Circuit Lays Another Trap for Unsuspecting Employers: Lupyan v. Corinthian Colleges Inc.*, 60 VILL. L. REV. *TOLLE LEGE* 47 (2015). For additional publications discussing Third Circuit precedent visit [villanovawlawreview.com](http://villanovawlawreview.com).



On behalf of Volumes LXIII and LXIV, we thank the students, faculty advisors, and contributors who have grown the *Third Circuit Review* over the past forty-five years. It is in their honor that we answer Chief Judge Seitz's charge by charging forward.

*Valerie Caras*

Editor-in-Chief, Volume LXIII

*Jason Kurtyka*

Executive Editor, Volume LXIII

*Timothy J. Muyano*

Editor-in-Chief, Volume LXIV

*Thallia Malespin*

Executive Editor, Volume LXIV

### THIRD CIRCUIT REVIEW: PRECEDENTIAL OPINION SUMMARY

The Precedential Opinion Summary collects precedential opinions issued by the U.S. Court of Appeals for the Third Circuit between January 1, 2017 and December 1, 2017. This compilation is designed to serve as a research tool rather than provide comprehensive analysis on any particular opinion. The summary is organized into two parts, civil and criminal matters, and within each part by issues of first impression, cases heard en banc, decisions concurrences or dissents, and an appendix of opinions arranged by subject matter.

#### CIVIL MATTERS

##### *Issues of First Impression*

AMERICANS WITH DISABILITIES ACT – In *McGann v. Cinemark USA, Inc.*,<sup>39</sup> the Third Circuit decided what accommodations a movie theater must provide to a blind and deaf patron. Judge Restrepo writing on behalf of Chief Judge Smith and Judge McKee vacated the district court and held that the ADA's requirement to provide "auxiliary aid or service" includes tactile interpreters at a movie theater.

ANTITRUST – IPSO FACTO IMMUNITY – In *Edinboro College Park Apartments v. Edinboro University Foundation*,<sup>40</sup> plaintiffs alleged that a state-owned university in Pennsylvania "conspired to monopolize the student-housing market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2."<sup>41</sup> The

39. 873 F.3d 218 (3d Cir. 2017) (Restrepo, J.).

40. 850 F.3d 567 (3d Cir. 2017) (Smith, C.J.) (affirmed in part, reversed in part).

41. *Id.* at 571.

Third Circuit determined which level of scrutiny to evaluate the university's conduct and determine whether it was entitled to any state action immunity.<sup>42</sup> Reasoning that "the [u]niversity is more analogous to a municipality than to a private market participant," the court applied the intermediate standard of review announced by the U.S. Supreme Court in *Town of Hallie v. City of Eau Claire*<sup>43</sup> and held that public universities are not entitled to ipso facto immunity when facing antitrust claims.<sup>44</sup>

**BANKRUPTCY – GRACE PERIODS** – In *In re Klaas*,<sup>45</sup> the Third Circuit confronted an issue of first impression among all circuit courts: "[W]hether bankruptcy courts have discretion to grant a brief grace period and discharge debtors who cure an arrearage in their payment plan shortly after the expiration of the plan term, and if so, what factors are relevant for the bankruptcy court to consider when exercising that discretion."<sup>46</sup> Judge Krause, joined by Judge Fisher and Judge Vanaskie, held that bankruptcy courts do have such discretion and may "grant a reasonable grace period for debtors to cure an arrearage."<sup>47</sup> The court identified a non-exhaustive list of five factors that a bankruptcy court should use to determine whether to allow a grace period.<sup>48</sup>

**CIVIL PROCEDURE – FORUM SELECTION AND TRANSFER** – In *In Re Howmeica Osteonics Corp.*,<sup>49</sup> the Third Circuit devised a "separate framework to determine how forum-selection clauses affect the § 1404(a) transfer analysis where both contracting and non-contracting parties are found in the same case and where the non-contracting parties' private interests run headlong into the presumption of *Atlantic Marine Construction Co. v. U.S. District Court*, 134 S. Ct. 568 (2013)." *Atlantic Marine* provided that in situations where "contracting parties have specified the forum in which they will litigate disputes arising from their contract, federal courts must honor the forum-selection clause '[i]n all but the most unusual cases.'"<sup>50</sup> Judge Krause, writing for Judge Sirica and Judge Fuentes, created a four-step inquiry to guide district courts: "(1) the forum-selection clauses, (2) the private and public interests relevant to non-contracting parties, (3) threshold issues related to severance, and (4) which transfer decision most promotes efficiency while minimizing prejudice to non-contracting parties' private interests."<sup>51</sup>

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42. *Id.* at 575.

43. 471 U.S. 34 (1985).

44. *Edinboro College Park Apartments*, 850 F.3d at 575.

45. 858 F.3d 820 (3d Cir. 2017) (Krause, J.).

46. *Id.* at 823.

47. *Id.* at 828.

48. *Id.* at 832.

49. 867 F.3d 390 (3d Cir. 2017) (Krause, J.) (vacated and remanded).

50. *Id.* at 378 (citations omitted).

51. *Id.* at 403–04.

DECLARATORY JUDGMENT ACT – LEGAL AND DECLARATORY RELIEF – In *Rarick v. Federated Service Insurance Company*,<sup>52</sup> the Third Circuit considered which standard a district court should use to review a complaint seeking both legal and declaratory relief. Splitting with the Second, Fourth, and Fifth Circuits, while joining the Seventh and Ninth Circuits, Judge Hardiman, writing for Judge Chagares and Judge Scirica, held that the independent claim test is the appropriate standard. That test “balances the court’s duty to hear legal claims with its discretion to decline jurisdiction over claims for declaratory relief. Under this test, the district court first determines whether claims seeking legal relief are independent of claims for declaratory relief.”<sup>53</sup>

IMMIGRATION – AGGRAVATED FELONY – In *Mateo v. Attorney General United States*,<sup>54</sup> Judge Vanaskie, writing on behalf of Judge McKee and Judge Jordan, applied the constitutional void-for-vagueness doctrine to the immigration context and joined the Sixth, Ninth, and Eleventh circuits to hold that the definition of “crime of violence” under 18 U.S.C. § 16(b) is unconstitutionally vague for purposes of the Immigration and Nationality Act’s definition of an aggravated felony.<sup>55</sup> The Supreme Court has granted certiorari in the Ninth Circuit’s sister opinion, *Lynch v. Dimaya*,<sup>56</sup> and the import of *Mateo* may be altered depending on *Dimaya*’s outcome.

IMMIGRATION – CRIME OF MORAL TURPITUDE – In *Idefonso-Candelario v. Attorney General of United States*,<sup>57</sup> the Third Circuit evaluated whether a violation of 18 Pa. Cons. Stat. § 5101—a statute criminalizing “obstructing the administration of law or other governmental function”—constitutes a crime of moral turpitude under the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I). Judge Stearns, writing on behalf of Judge Jordan and Judge Krause, applied the categorical approach to conclude that it was not.<sup>58</sup>

EDUCATION – EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1974 – In *Issa v. School District of Lancaster*,<sup>59</sup> the Third Circuit held that to allege a violation of the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. § 1703(f), an individual “must satisfy four elements: (1) the defendant must be an educational agency, (2) the plaintiff must face language barriers impeding her equal participation in the defendant’s instructional programs, (3) the defendant must have failed to take appropriate action to overcome those barriers, and (4) the plaintiff must have been denied equal educational opportunity on account of her race, color, sex, or na-

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52. 852 F.3d 223 (3d Cir. 2017) (Hardiman, J.) (vacated and remanded).

53. *Id.* at 228.

54. 870 F.3d 228 (3d Cir. 2017) (Vanaskie, J.).

55. *Id.* at 234–35.

56. 137 S. Ct. 31 (2016).

57. 866 F.3d 102 (3d Cir. 2017) (Stearns, J.).

58. *Id.* at 107.

59. 847 F.3d 121 (3d Cir. 2017) (Fisher, J.) (affirmed and remanded).

tional origin.”<sup>60</sup> Regarding the third element and the “appropriate action” requirement, Judge Fisher, joined by Judge Krause and Judge Melloy, followed the approach taken by the Fifth Circuit in *Castaneda v. Pickard*.<sup>61</sup> The court did not adopt *Castaneda*’s framework “without qualification,” however, and instead concluded that “fine tuning must await future cases.”<sup>62</sup> Judge Fisher commented that this was the first time the Third Circuit was tasked with interpreting the EEOA.<sup>63</sup>

EDUCATION – ATTORNEY’S FEES AND THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT – In *M.R. v. Ridley School District*,<sup>64</sup> the Third Circuit considered the “stay put” provision under the Individuals with Disabilities Education Act (IDEA) and whether a plaintiff, if prevailing under that provision which provides “backward-looking and compensatory relief,” may seek an award of attorney’s fees.<sup>65</sup> Judge Krause, writing on behalf of Judge Vanaskie and Judge Restrepo, held that a plaintiff under those circumstances constitutes a prevailing party, and accordingly, may seek to recover attorneys’ fees.<sup>66</sup>

ELEVENTH AMENDMENT AND CLASS ACTIONS – Although the underlying issue in *In re Flonase Antitrust Litigation*<sup>67</sup> was a class action alleging violations of state antitrust law, Judge Greenaway writing on behalf of Judge Chagares and Judge Vanaskie concluded that the Eleventh Amendment applies to class action settlements and held that because state of Louisiana had not waived sovereign immunity, it was not bound by a class settlement that prohibited class members from bringing separate suits against each other. A petition for certiorari has been docketed to the U.S. Supreme Court.<sup>68</sup>

FAIR HOUSING ACT – In *Revoock v. Cowpet Bay West Condominium Association*,<sup>69</sup> the Third Circuit held that under federal common law, claims under the Fair Housing Act “survive the death of a party.”<sup>70</sup> Accordingly, Judge Restrepo, joined by Judges Fuentes and Vanaskie, reversed the district court’s grant of summary judgment.

FALSE CLAIMS ACT – In *United States ex rel. Petras v. Simparel, Inc.*,<sup>71</sup> the Third Circuit joined the Fifth and Ninth Circuits to hold that the Small Business Administration, when acting as a receiver for a shareholder does

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60. *Id.* at 131–32.

61. 648 F.2d 989, 1009–10 (5th Cir. 1981).

62. *Id.* at 134.

63. *Id.* at 124, 131.

64. 868 F.3d 218 (3d Cir. 2017) (Krause, J.) (reversed and remanded).

65. *Id.* at 225.

66. *Id.*

67. 879 F.3d 61 (3d Cir. 2017) (Greenaway, J.).

68. 879 F.3d 61 (3d Cir. 2017), *petition for cert. filed*, 2018 WL 3361039 (U.S. July 6, 2018) (No. 18-42).

69. 853 F.3d 96 (3d Cir. 2017) (Restrepo, J.) (reversed in part, vacated in part)

70. *Id.* at 110.

71. 857 F.3d 497 (3d Cir. 2017) (McKee, J.) (affirmed).

not act as the government, and accordingly, may not raise a claim under the False Claims Act. Judge McKee, writing for Judge Hardiman and Judge Rendell, found that “when a federally chartered— but private—entity is placed into receivership, the relevant federal agency, acting as receiver, takes over the day-to-day operations and assumes the powers of shareholders, board of directors, and management.”<sup>72</sup> Accordingly, the entity does not act as the government.<sup>73</sup>

FALSE CLAIMS ACT – In *United States ex rel. Spay v. CVS Caremark Corporation*,<sup>74</sup> the Third Circuit considered the “government knowledge inference” defense to False Claims Act violations. That defense can “defeat a finding of scienter in certain circumstances.”<sup>75</sup> Joining six other circuits, the Third Circuit held that “there are two prongs to [the] defense: (1) the government knew about the alleged false statement(s), and (2) the defendant knew that the government knew.”<sup>76</sup> Judge McKee authored the opinion of the court, joined by Chief Judge Smith and Judge Restrepo.

HOMEOWNERS PROTECTION ACT – In *Fried v. JP Morgan Chase & Co.*,<sup>77</sup> the Third Circuit considered whether, under the Homeowners Protection Act, 12 U.S.C. § 4901, a mortgage servicer could provide relief to a homeowner struggling financially by lowering the principal of a mortgage while simultaneously extending the term of the loan.<sup>78</sup> Judge Ambro, writing on behalf of Judge Vanaskie and Judge Scirica, held that the Act required mortgage servicers, when modifying a loan, to link the end date of the modified loan to the initial purchase price of the home, rather than link the end date of modified loan to any updated property values estimated by a broker as a result of the lowered principal.<sup>79</sup> Judge Ambro concluded that “the Protection Act required calculation of [the plaintiff’s] termination date on the basis of her home’s original value, which under the Act is its purchase price.”<sup>80</sup>

PRODUCTS LIABILITY – In *In re: Asbestos Products Liability Litigation*,<sup>81</sup> the Third Circuit confronted an issue of first impression as to whether under maritime law, a manufacturer constructing a certain type of “bare-metal” product can be held liable for future asbestos-related injuries. Splitting with the Sixth Circuit and at least one district court,<sup>82</sup> Judge Vanaskie,

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72. *Id.* at 503 (internal citations and quotation marks omitted).

73. *Id.* at 366.

74. 875 F.3d 746 (3d Cir. 2017) (McKee, J.) (affirmed).

75. *Id.* at 748.

76. *Id.* at 758.

77. 850 F.3d 590 (3d Cir. 2017) (Ambro, J.) (affirmed, remanded).

78. *Id.* at 593.

79. *Id.* at 593.

80. *Id.* at 593.

81. 873 F.3d 232 (3d Cir. 2017), *cert. granted*, 138 S. Ct. 1990 (2018) (Vanaskie, J.).

82. *Id.* at 235 (citing *Lindstrom v. A-C Prod. Liab. Tr.*, 424 F.3d 488, 492, 494–97 (6th Cir. 2005); *Cabasug v. Crane Co.*, 989 F. Supp. 2d 1027, 1038–43 (D. Haw. 2013)).

writing on behalf of Judge Shwartz and Restrepo, joined other district courts to hold that a manufacturer could be liable if the asbestos related injury was a “reasonably foreseeable result of the manufacturer’s actions” in the context of a negligence claim.<sup>83</sup> The U.S. Supreme Court has granted certiorari on this case.<sup>84</sup>

PENNSYLVANIA INSURANCE CODE – Although *In re Trustees of Conneaut Lake Park, Inc.*<sup>85</sup> case arose in the context of bankruptcy proceedings, the Third Circuit faced an issue of first impression in Pennsylvania law interpreting Section 638 of Pennsylvania’s Insurance Code and the phrase “named insured” therein. Under Section 683, an insurance company may not pay fire insurance proceeds to a named insured before the company contacts the local municipality to determine whether delinquent taxes are owned on the property. In this case, the named insured was not responsible for the delinquent taxes, and thus, the Third Circuit had to determine whether the named insured was eligible to recover under the policy. Predicting how the Pennsylvania Supreme Court might rule, Judge Hardiman, writing on behalf of Judges Fisher and Greenaway, reversed the district court, holding the text of the statute required the named insured to pay delinquent taxes; even though in this case, the entity clearly responsible for those taxes was not the same entity as the named insured. Although the named insured here argued that it suffered a Fifth Amendment taking because its insurance proceeds went to the government, the Third Circuit disagreed, explaining that the named insured had did not have a legally cognizable property interest in the proceeds greater than that of the taxing authorities.

PRISONER LITIGATION – IN FORMA PAUPERIS – In *Parker v. Montgomery County Correctional Facility/Business Office Manager*,<sup>86</sup> the Third Circuit split with the Ninth Circuit to hold that an indigent prisoner is not entitled to proceed in forma pauperis to appeal a court’s determination that the prisoner has received a third-strike under 28 U.S.C.A. § 1915(g).<sup>87</sup> Chief Judge Smith, writing on behalf of Judge Fuentes and Judge Stark,<sup>88</sup> reasoned that the plain language of the statute required such an outcome.<sup>89</sup>

RELIGIOUS FREEDOM RESTORATION ACT – ACA CONTRACEPTIVE MANDATE – In *Real Alternatives, Inc. v. Secretary Department of Health and Human Services*,<sup>90</sup> the Third Circuit considered a claim involving the Religious

83. *Id.* at 235 (citing *Quirin v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760, 768–70 (N.D. Ill. 2014); *Chicano v. Gen. Elec. Co.*, No. Civ. A. 03-5126, 2004 WL 2250990, at \*6 (E.D. Pa. Oct. 5, 2004)).

84. 138 S. Ct. 1990 (2018).

85. 855 F.3d 519 (3d Cir. 2017) (Hardiman, J.).

86. 870 F.3d 144 (3d Cir. 2017) (Smith, C.J.).

87. *Id.* at 153.

88. The Honorable Leonard P. Stark, Chief Judge of the United States District Court for the District of Delaware, sat by designation.

89. *Id.* at 152.

90. 867 F.3d 338 (3d Cir. 2017) (Rendell, J.) (Jordan, J. concurring in part and dissenting in part) (affirmed).

Freedom Restoration Act (RFRA) and the Patient Protection and Affordable Care Act's contraceptive mandate.<sup>91</sup> Specifically, the court had to determine whether "employees, who oppose contraceptives on religious grounds but work for secular employers, experience a substantial burden on their religious exercise when the government regulates group health care plans and health care insurance providers by requiring them to offer health insurance coverage that includes coverage for services the employees find incompatible with their religious beliefs."<sup>92</sup> Judge Rendell, writing on behalf of Judge Greenaway and Judge Jordan, concluded the plaintiffs did not show that the contraceptive mandate "imposes a substantial burden on their religious beliefs" and accordingly declined to "reach the question of whether the [c]ontraceptive [m]andate is the least restrictive means of furthering a compelling governmental interest."<sup>93</sup> Judge Jordan wrote separately to concur in part and dissent in part, and opined that the plaintiffs had "adequately pled and provided sufficient evidence to demonstrate that the [c]ontraceptive [m]andate is a substantial burden on their free exercise of religion."<sup>94</sup>

SECTION 1983 – DELIBERATE INDIFFERENCE – In *Pearson v. Prison Health Service*,<sup>95</sup> the Third Circuit considered "whether and when medical expert testimony may be necessary to create a triable issue on the subjective prong of a deliberate indifference case."<sup>96</sup> Judge Fisher, joined by Judge Krause and Judge Greenberg, held that "medical expert testimony may be necessary in some adequacy of care cases when the propriety of a particular diagnosis or course of treatment would not be apparent to a layperson."<sup>97</sup> The court concluded, however, that testimony was not necessary under the circumstances of this case.<sup>98</sup>

SECTION 1983 – EXCESSIVE FORCE CLAIM – In *Davenport v. Borough of Homestead*,<sup>99</sup> the Third Circuit discussed when excessive force claims should be analyzed under the Fourth or Fourteenth Amendment.<sup>100</sup> Judge Fisher, joined by Judge Roth and Judge Hardiman, held that "a passenger shot by an officer during the course of a vehicular pursuit may seek relief under the Fourth Amendment" and concluded that the district court erred in "independently analyzing [plaintiff's] Fourth and Four-

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91. *Id.* at 342–43.

92. *Id.* at 354–55.

93. *Id.* at 366.

94. *Id.* at 367 (Jordan, J. concurring in part and dissenting in part).

95. 850 F.3d 526 (3d Cir. 2017) (Fisher, J.) (affirmed in part, reversed in part, remanded).

96. *Id.* at 535.

97. *Id.* at 537.

98. *Id.* at 537–38.

99. 870 F.3d 273 (3d Cir. 2017) (Fisher, J.).

100. *Id.* at 276–77.

teenth Amendment claims.”<sup>101</sup> The Third Circuit joined the Fourth, Fifth, and Eleventh Circuits in making this determination.<sup>102</sup>

SECTION 1983 – FIRST AMENDMENT RETALIATION – In *Fields v. City of Philadelphia*,<sup>103</sup> the Third Circuit concurred with the First, Fifth, Seventh, Ninth, and Eleventh Circuits in holding that “First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public.”<sup>104</sup> The court nevertheless concluded that police officers were entitled to qualified immunity in plaintiff’s First Amendment Retaliation claim.<sup>105</sup> The case came before Judge Ambro, Judge Restrepo, Judge Nygaard, with Judge Ambro writing the opinion of the court. Judge Nygaard dissented, arguing that the right at issue was clearly established.<sup>106</sup>

SECTION 1983 – FOURTEENTH AMENDMENT DUE PROCESS – In *Steele v. Cicchi*,<sup>107</sup> the Judge Restrepo, writing on behalf of Judge Ambro and Judge Nygaard, concluded that a defendant has “a protected liberty interest in exercising his bail option once his bail was set” and a violation of that liberty interest could amount to a due process violation.<sup>108</sup> The court joined the Tenth and Eleventh Circuits in making this determination.<sup>109</sup>

TITLE VII – EMPLOYER RETALIATION – In *Carvalho-Grevious v. Delaware State University*,<sup>110</sup> the Third Circuit examined “what a plaintiff must bring as part of her prima facie case of retaliation to survive a motion for summary judgment in the wake of the Supreme Court’s decision in *Nassar*, which held that ‘Title VII retaliation claims must be proven according to traditional principles of but-for causation.’”<sup>111</sup> Judge Fisher, joined by Chief Judge Smith and Judge Ambro, concluded that a plaintiff need not establish but-for causation in his or her prima facie case.<sup>112</sup> The court held that “at the prima facie stage, a plaintiff need only proffer evidence sufficient to raise the inference that her engagement in a protected activity was the *likely reason* for the adverse employment action, not the but-for

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101. *Id.* at 279.

102. *Id.*

103. 862 F.3d 353 (3d Cir. 2017) (Ambro, J.) (reversed and remanded) (Nygaard, J., concurring in part and dissenting in part).

104. *Id.* at 355–56.

105. *Id.* at 355.

106. *Id.* at 362.

107. 855 F.3d 494 (3d Cir. 2017) (Restrepo, J.) (affirmed),

108. *Id.* at 502–04.

109. *Id.*

110. 851 F.3d 249 (3d Cir. 2017) (Fisher, J.) (affirmed in part, reversed in part).

111. *Id.* at 257 (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)).

112. *Id.* at 253.



reason.”<sup>113</sup> The court joined the Fourth Circuit in making this determination.<sup>114</sup>

TITLE IX – EDUCATION PROGRAM – In *Doe v. Mercy Catholic Medical Center*,<sup>115</sup> the Third Circuit joined the Second Circuit to hold that “a ‘program or activity’ under § 1687 is an ‘education program or activity’ under § 1681(a) if it has ‘features such that one could reasonably consider its mission to be, at least in part, educational.’”<sup>116</sup> Judge Fisher, writing on behalf of Judge Krause and Judge Melloy,<sup>117</sup> found that a hospital’s residency program qualified as such a program or activity. The Court also joined the First and Fourth Circuits, and rejected approaches taken by the Fifth and Seventh Circuits, to hold that “a private *quid pro quo* claim exists for employees of federally-funded education programs under Title IX notwithstanding Title VII’s concurrent applicability, for private-sector employees may pursue independently their rights under both Title VII and other applicable federal statutes.”<sup>118</sup>

TRADEMARKS – THE MCCARTHY TEST – In *Covertch Fabricating, Inc. v. TVM Building Products, Inc.*,<sup>119</sup> the Third Circuit had to decide between the “First Use Test” and the “McCarthy Test” in adopting a framework to assess the rightful owner of a trademark.<sup>120</sup> Judge Krause, writing on behalf of Judge Jordan and Judge Vanaskie, adopted the McCarthy test, and held “that as between a manufacturer and its exclusive distributor, there is a rebuttable presumption of initial trademark ownership in favor of the manufacturer, and that [six-factor McCarthy] test is the proper analytical tool through which a distributor may attempt to rebut that presumption in the absence of a contractual agreement.”<sup>121</sup> Judge Krause noted that this test is consistently used in some form by other circuits, including the Seventh and Ninth.<sup>122</sup>

#### *En Banc*

MARITIME – COLLECTIVE BARGAINING AGREEMENTS – In *Joyce v. Maersk Line Ltd.*,<sup>123</sup> the Third Circuit overruled its prior holding in *Barnes v.*

113. *Id.*

114. *Id.* at 259. It appears that the circuit law is muddled on this issue. See *Foster v. Univ. of Md.–E. Shore*, 787 F.3d 243, 251 n.10 (4th Cir. 2015) (collecting cases).

115. 850 F.3d 545 (3d Cir. 2017) (Fisher, J.) (affirmed in part, reversed in part).

116. *Id.* at 555.

117. Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit sat by designation. *Id.* at 545.

118. *Id.* at 564.

119. 855 F.3d 163 (3d Cir. 2017) (Krause, J.) (affirmed in part, vacated in part).

120. *Id.* at 170.

121. *Id.* at 171.

122. *Id.* at 171–72.

123. 876 F.3d 502 (3d Cir. 2017) (Jordan, J.) (affirmed).

*Andover Co., L.P.*<sup>124</sup> to hold that “a union contract freely entered by a seafarer—a contract that includes rates of maintenance, cure, and unearned wages—will not be reviewed piecemeal by courts unless there is evidence of unfairness in the collective bargaining process.”<sup>125</sup> Writing for the court, Judge Jordan explained that adherence to a collective bargaining agreement made more sense in modern times because “the need for judicial intervention to protect seamen has been substantially lessened and thus the common law basis for requiring courts to disregard the freely negotiated agreements of private parties and to refuse to enforce the terms of the collective bargaining agreement also carries substantially less force.”<sup>126</sup> Judge Jordan further explained that by overruling *Barnes*, the Third Circuit was now joining every other circuit to have considered this question.<sup>127</sup>

### *Split Decisions*

ADMINISTRATIVE LAW – CHEVRON DEFERENCE – In *Egan v. Delaware River Port Authority*,<sup>128</sup> a plaintiff brought a retaliation claim against his employer under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq.*<sup>129</sup> The claim brought a complex question of administrative law as the Third Circuit had to “examine the regulation upon which [the plaintiff’s] FMLA retaliation claim is based and determine whether there is any requirement that a plaintiff introduce direct evidence of retaliation to pursue a mixed-motive theory of liability.”<sup>130</sup> Judge Shwartz, writing on behalf of Chief Judge Smith and Judge Jordan, held that the regulation was entitled to Chevron deference.<sup>131</sup>

Although he concurred in the judgment, Judge Jordan wrote separately to express his “discomfort” with the court’s reasoning as “dictated by the regimes of deference adopted by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Auer v. Robbins*, 519 U.S. 452 (1997).”<sup>132</sup> He explains that this deference doctrine “embed perverse incentives in the operations of government; they spread the spores of the ever-expanding administrative state; they require us at times to lay aside fairness and our own best judgment and instead bow to the nation’s most powerful litigant, the government, for no reason other than that it is the government.”<sup>133</sup>

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124. 900 F.2d 630 (3d Cir. 1990).

125. *Id.* at 503.

126. *Id.* at 509 (citations and internal quotation marks omitted).

127. *Id.* at 512.

128. 851 F.3d 263 (3d Cir. 2017) (Shwartz, J.)

129. *Id.* at 266–67.

130. *Id.* at 267.

131. *Id.* at 274.

132. *Id.* at 278.

133. *Id.*

ANTITRUST – In *Valspar Corporation v. E.I. Du Pont De Nemours and Company*,<sup>134</sup> the Third Circuit considered whether a defendant violated Section 1 of the Sherman Act by appearing to conspire with other manufacturers by raising prices at the same time.<sup>135</sup> Defendants argued that this was not a Sherman Act violation “because the market for titanium dioxide is an oligopoly” and accordingly, “the price movement was caused by ‘conscious parallelism’—an economic theory that explains oligopolists will naturally follow a competitor’s price increase in the hopes that each firm’s profits will increase.”<sup>136</sup> The district court agreed and granted summary judgement in favor of defendants, and Judge Hardiman writing for the court affirmed.<sup>137</sup> Judge Stengel dissented, opining that issues of fact precluded granting summary judgement.<sup>138</sup>

CLASS CERTIFICATION – ASCERTAINABILITY – In *City Select Auto Sales Inc. v. BMW Bank of North America Inc.*,<sup>139</sup> the Third Circuit considered whether putative plaintiffs sufficiently met Rule 23’s ascertainability requirement in a motion for class certification.<sup>140</sup> Judge Scirica, writing on behalf of Judge Krause and Judge Fuentes, held that the plaintiffs had sufficiently met the ascertainability requirement and vacated the judgement of the district court.<sup>141</sup> Judge Fuentes wrote separately in a concurring opinion to specifically critique the Third Circuit’s treatment of the ascertainability requirement under Rule 23, and would have joined the Third Circuit with the Second, Sixth, Seventh, and Ninth Circuits to reject it.

COMMERCIAL LAW – ARBITRATION – In *White v. Sunoco, Inc.*,<sup>142</sup> the Third Circuit considered whether a defendant can compel a plaintiff to arbitration if the plaintiff signed a credit card agreement with a third-party not named in the law suit, and the defendant is a neither mentioned in the credit card agreement nor is a signatory.<sup>143</sup> The district court denied the defendant’s motion to compel arbitration, and in an opinion joined by Judge Chagares and Restrepo, the Third Circuit affirmed.<sup>144</sup> Judge Roth dissented and opined that the credit card agreement was an integrated contract.<sup>145</sup> Accordingly, she concluded that under basic contract interpretation principles, the plaintiff could be compelled to arbitration.<sup>146</sup>

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134. 873 F.3d 185 (3d Cir. 2017) (Hardiman, J.) (affirmed).

135. *Id.* at 189.

136. *Id.* at 189–90.

137. *Id.* at 190.

138. *Id.* at 203.

139. 867 F.3d 434 (3d Cir. 2017) (Scirica, J.) (vacated and remanded) (Fuentes, J. concurring).

140. *Id.* at 436.

141. *Id.* at 436.

142. 870 F.3d 257 (3d Cir. 2017) (Chagares, J.).

143. *Id.* at 259.

144. *Id.*

145. *Id.* at 268–69.

146. *Id.* at 269.

EMPLOYMENT LAW – NEW JERSEY CONSCIENTIOUS EMPLOYEE PROTECTION ACT – In *Trzaska v. L'Oreal USA, Inc.*,<sup>147</sup> a plaintiff alleged a claim under the New Jersey Conscientious Employee Protection Act (CEPA).<sup>148</sup> The plaintiff claimed his employer fired him for refusing “to violate various ethical rules that govern the legal profession” and accordingly, “asserts that this action violated New Jersey employment law, as one cannot be fired for refusing to violate regulations or public policy at the instruction of his employer.”<sup>149</sup> Judge Ambro, writing on behalf of Judge Chagares and Judge Fuentes, reversed the district court’s grant of the defendant’s motion to dismiss, holding that the plaintiff had alleged a plausible claim.<sup>150</sup> Judge Chagares dissented, arguing in part that plaintiff had not met his burden under CEPA to state a claim that would survive a motion to dismiss.<sup>151</sup>

SECTION 1983 – STATE ACTION – In *Borrell v. Bloomsburg University*,<sup>152</sup> the Third Circuit decided whether a program director of a joint partnership between a public university and private hospital was a state actor for liability purposes under § 1983.<sup>153</sup> Judge Hardiman, writing on behalf of Judge Fisher and Judge Roth, held the program director was not a state actor.<sup>154</sup> Judge Roth concurred in the judgment but wrote separately to explain why she believed the plaintiff received the due process she was entitled to.<sup>155</sup>

STANDING – In *Cottrell v. Alcon Laboratories*,<sup>156</sup> the Third Circuit reversed the district court’s dismissal of a class action alleging violation of consumer protection statutes. Plaintiffs alleged that “manufacturers and distributors of the medication packaged it in such a way that forced them to waste it.” Judge Restrepo, joined by Judge Chagares, concluded the plaintiffs had alleged injury in fact, and thus, had standing. Judge Roth dissented, opining that the plaintiffs did not have standing because their injuries were too speculative.

UNITED STATES HOUSING ACT – RIGHT TO REMAIN – In *Hayes v. Harvey*,<sup>157</sup> the Third Circuit considered whether the United States Housing Act of 1937’s enhanced voucher provision, 42 U.S.C. § 1437f(t), creates for tenants an enforceable “right to remain in their unit as long as it is

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147. 865 F.3d 155 (3d Cir. 2017) (Ambro, J.) (affirmed) (Chagares, J. concurring in part and dissenting in part).

148. *Id.* at 157.

149. *Id.*

150. *Id.*

151. *Id.* at 164.

152. 870 F.3d 154 (3d Cir. 2017) (Hardiman, J.) (Roth, J. concurring in part) (reversed and remanded).

153. *Id.* at 160–61.

154. *Id.* at 162.

155. *Id.* at 163–64.

156. 874 F.3d 154 (3d Cir. 2017) (Restrepo, J.).

157. 874 F.3d 98 (2017).

offered for rental housing.”<sup>158</sup> Writing the opinion of the court, Judge Fisher held it did not, and concluded that the “§ 1437f(t)(1)(B) obligates HUD to provide ‘enhanced’ financial assistance to be credited toward an assisted family’s rental obligations during any period in which the family remains eligible under § 1437f(t)(1)(C), and that § 1437f(t)(1)(C) speaks only to the ways in which the family’s conduct may relieve HUD of that financial obligation.”<sup>159</sup>

Judge Greenaway dissented, arguing that the statute plainly means “landlords may not evict enhanced voucher-holders without cause.”<sup>160</sup> He concluded that the majority erred by being “at odds not only with the statutory text, but with the interpretations of the other two branches of government as well. HUD—the expert agency tasked with administering this statute—has found a right to remain.”<sup>161</sup>

This judgement was later vacated by *Hayes v. Harvey*<sup>162</sup> when the court met en banc in 2018. Judge Greenaway, writing on behalf of the entire court, concluded that “because the statute’s plain language and history make evident that enhanced voucher holders may not be evicted absent good cause, even at the end of a lease term.”<sup>163</sup>

EMPLOYMENT – NATIONAL LABOR RELATIONS BOARD – In *National Labor Relations Board v. New Vista Nursing and Rehabilitation*,<sup>164</sup> the Third Circuit evaluated the National Labor Relation Board’s conclusion that an employer acted unlawfully by disallowing employees to unionize and subsequently refusing to bargain with them.<sup>165</sup> Writing for the court, Chief Judge Smith explained that the National Labor Relation Board erred in making such a conclusion because it applied a test at odds with Third Circuit precedent in *NLRB v. Attleboro Associates, Ltd.*, 176 F.3d 154 (3d Cir. 1999).<sup>166</sup> The court remanded the case to the National Labor Relation Board so that they could properly consider the question presented under *Attleboro*.<sup>167</sup>

Judge Greenaway wrote separately critiquing the majority’s reasoning, specifically its interpretation of two Third Circuit decisions: *NLRB v. Attleboro Associates, Ltd.*, 176 F.3d 154 (3d Cir. 1999), and *Mars Home for Youth v. NLRB*, 666 F.3d 850 (3d Cir. 2011).<sup>168</sup>

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158. *Id.* at 100.

159. *Id.*

160. *Id.* at 111.

161. *Id.* at 111.

162. 903 F.3d 32 (3d Cir. 2018).

163. *Id.* at 35. Judge Fisher and Judge Hardiman—who supported the 2017 *Harvey* opinion—dissented in the 2018 en banc opinion.

164. 70 F.3d 113 (3d Cir. 2017) (Smith, C.J.) (remanded) (Greenaway, J. concurring in part and dissenting in part).

165. *Id.* at 116.

166. *Id.*

167. *Id.*

168. *Id.* at 136.

SECTION 1983 – QUALIFIED IMMUNITY – In *Kedra v. Schroeter*,<sup>169</sup> the Third Circuit reversed the district court's dismissal of a § 1983 substantive due process claim on qualified immunity grounds.<sup>170</sup> Judge Krause, writing on behalf of Judge Melloy, found the law clearly established “an individual's right not to be subjected, defenseless, to a police officer's demonstration of the use of deadly force in a manner contrary to all applicable safety protocols.”<sup>171</sup> In a concurring opinion, Judge Fisher stated he would define the clearly established right more narrowly, “as: a police officer's right not to be subjected to a firearms training in which the instructor acts with deliberate indifference, that is, consciously disregards a known risk of death or great bodily harm.”<sup>172</sup>

RELIGIOUS FREEDOM RESTORATION ACT – ACA CONTRACEPTIVE MANDATE – For a discussion of *Real Alternatives, Inc. v. Secretary Department of Health and Human Services*, see *supra* section C.

TAX – *Ifeld* Doctrine – In *Duquesne Light Holdings, Inc. & Subsidiaries v. Commissioner of Internal Revenue*,<sup>173</sup> the Judge Ambro, Judge Krause, and Judge Hardiman interpreted the “*Ifeld* doctrine” named for *Charles Ifeld Co. v. Hernandez*, 292 U.S. 62 (1934), which holds that the Internal Revenue Code “should not be interpreted to allow [the taxpayer] ‘the practical equivalent of a double deduction’ . . . absent a clear declaration of intent by Congress.”<sup>174</sup> Judge Ambro wrote the opinion of the court, and he concluded that the tax court properly applied the *Ifeld* doctrine to grant summary judgement to the Internal Revenue Service.<sup>175</sup>

Judge Hardiman dissented, explaining: “[a]ccording to the Majority, this case concerns the continued vitality of the so-called *Ifeld* doctrine for interpreting the Internal Revenue Code. Yet there can be no doubt that *Ifeld* retains its vitality as a precedent of the Supreme Court . . . the true question presented is whether *Ifeld* applies where, as here, a hastily issued regulation authorizes the very actions that *Ifeld* cautions against.”<sup>176</sup> Accordingly, he opines that summary judgment in favor of the Internal Revenue Service was improper.<sup>177</sup>

TITLE VII – SUPERVISOR – In *Moody v. Atlantic City Board of Education*,<sup>178</sup> Judge Schwartz writing on behalf of Judge Greenaway and Judge Rendell engaged in a fact-sensitive analysis to conclude that the district court erred in finding that an individual was not plaintiff's supervisor for

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169. 876 F.3d 424 (3d Cir. 2017) (Krause, J.) (Fisher, J. concurring).

170. *Id.* at 432.

171. *Id.* at 449.

172. *Id.* at 458.

173. 861 F.3d 396 (3d Cir. 2017) (Ambro, J.) (affirmed) (Hardiman, J. dissenting).

174. *Id.* at 399.

175. *Id.* at 399.

176. *Id.* at 417.

177. *Id.* at 426.

178. 870 F.3d 206 (3d Cir. 2017) (Shwartz, J.).

purposes of a sexual harassment claim under Title VII.<sup>179</sup> Judge Rendell wrote separately, concurring in part and dissenting in part, and opined that the U.S. Supreme Court's decision in *Vance v. Ball State University*<sup>180</sup> precluded such a finding. She argued that under *Vance*, "the responsibility to direct others does not make an employee a 'supervisor.'" <sup>181</sup>

### *Appendix of Precedential Civil Opinions*

#### *Abstention*

*Hamilton v. Bromley*, 862 F.3d 329 (3d Cir. 2017) (Fisher, J.) (affirmed on alternate grounds) (rejecting district court's dismissal on *Younger* abstention because it did not resolve first whether the case was moot because "a federal court can abstain from exercising its jurisdiction only if it has jurisdiction to abstain from").

#### *Administrative Law*

*Council Tree Investors, Inc. v. Federal Communications Commission*, 863 F.3d 237 (3d Cir. 2017) (Hardiman, J.) (holding that Federal Communications Commission "acted legally when it limited the bidding credits available" to designated entities).

*Egan v. Delaware River Port Authority*, 851 F.3d 263 (3d Cir. 2017) (Shwartz, J.) (affirmed in part, vacated and remanded in part) (upholding Department of Labor regulation interpreting the Family and Medical Leave Act under *Chevron*) (Jordan, J. concurring) (expressing discomfort with regime of *Chevron* deference).

*Delaware Riverkeeper Network v. Secretary of Pennsylvania Department of Environmental Protection*, 870 F.3d 171 (3d Cir. 2017) (Smith, J.) (denying petition to review Pennsylvania Department of Environmental Protection approval of an interstate pipeline project under the Natural Gas Act of 1938 and noting that "agency's unique interpretation of water dependency is reasonable and worthy of deference").

*Delaware Riverkeeper Network v. United States Army Corps of Engineers*, 869 F.3d 148 (3d Cir. 2017) (Smith, C.J.) (denying petition to review Pennsylvania Department of Environmental Protection approval of an interstate pipeline project under the Natural Gas Act of 1938).

#### *Antitrust*

*In re Wellbutrin XL Antitrust Litigation Indirect Purchaser Class*, 868 F.3d 132 (3d Cir. 2017) (Jordan, J.) (affirming district court's grant of summary judgement to drug manufacturer on antitrust violation claims).

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179. *Id.* at 210–18.

180. 570 U.S. 421, 429 (2013).

181. *Moody*, 870 F.3d at 227 (Rendell, J. concurring in part and dissenting in part).

*In re Lipitor Antitrust Litigation*, 868 F.3d 231 (3d Cir. 2017) (Smith, C.J.) (reversed and remanded) (reversing district court's dismissal of claims because plaintiffs plausibly pled that defendants entered into "reverse payment settlement agreements" and such agreements are subject to antitrust scrutiny).

*Edinboro College Park Apartments v. Edinboro University Foundation*, 850 F.3d 567 (3d Cir. 2017) (Smith, C.J.) (affirmed in part, reversed in part) (issue of first impression) (applying intermediate standard of review in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) and holding that public universities are not entitled to ipso facto immunity when facing claims arising under Section 2 of the Sherman Act, 15 U.S.C. § 2).

*Valspar Corporation v. E.I. Du Pont De Nemours and Company*, 873 F.3d 185 (3d Cir. 2017) (Hardiman, J.) (affirmed) (affirming district court's grant of summary judgment to plaintiff in price fixing action under the Sherman Act) (Stengel, C.J. dissenting)<sup>182</sup> (opining that fact issues should have precluded summary judgement).

#### *Bankruptcy*

*In re Klaas*, 858 F.3d 820 (3d Cir. 2017) (Krause, J.) (affirmed) (issue of first impression) (holding "that bankruptcy courts retain discretion under the Bankruptcy Code to grant a reasonable grace period for debtors to cure an arrearage").

*In re Linear Electric Company, Inc.*, 852 F.3d 313 (3d Cir. 2017) (Roth, J.) (holding suppliers violated automatic stay in bankruptcy proceedings by asserting construction lien against owner of property where supplies were installed).

*In re Lansaw*, 853 F.3d 657 (3d Cir. 2017) (Melloy, J.)<sup>183</sup> (concluding that conclude that 11 U.S.C. § 362(a) "authorizes the award of emotional-distress damages and that the [plaintiffs] presented sufficient evidence to support such an award" and concluding that plaintiffs were also properly awarded punitive damages).

*In re Giacchi*, 856 F.3d 244 (3d Cir. 2017) (Roth, J.) (affirming district court's denial of discharge under 11 U.S.C. § 523(a)(1)(B)).

*In re Ross*, 858 F.3d 779 (3d Cir. 2017) (Vanaskie, J.) (vacated and remanded) (holding that "bankruptcy court does indeed have the authority to issue a filing injunction even in the context of approving a debtor's 11 U.S.C. § 1307(b) voluntary dismissal because nothing in the Bankruptcy Code's express terms says otherwise").

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182. Lawrence F. Stengel, Chief United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

183. Michael J. Melloy, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sat by designation. *In re Lansaw*, 853 F.3d 657, 660 (3d Cir. 2017).



*In re SemCrude L.P.*, 864 F.3d 280 (3d Cir. 2017) (Ambro, J.) (affirming bankruptcy court's grant of summary judgment to downstream purchasers).

*In re World Imports, Ltd.*, 862 F.3d 338 (3d Cir. 2017) (Hardiman, J.) (reversed and remanded) (holding that "received" in 11 U.S.C. § 503(b)(9) requires physical possession).

*In re AE Liquidation, Inc.*, 866 F.3d 515 (3d Cir. 2017) (Krause, J.) (affirming bankruptcy and district court and holding that under the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101—2109, "a business must notify its employees of a pending layoff once the layoff becomes probable").

*In Re: J & S Properties, LLC*, 872 F.3d 138 (3d Cir. 2017) (Hardiman, J.) (holding that "qualified immunity applies to discretionary actions taken by a trustee to preserve the bankruptcy estate's assets") (Fisher, J. concurring) (concurring in judgment but opining that issue of qualified immunity was not properly before the court).

*In re Pursuit Capital Management, LLC*, 874 F.3d 124 (3d Cir. 2017) (Jordan, J.) (holding appeal statutorily moot under 11 U.S.C. § 363(m) and affirming district court's dismissal).

*In re Bressman*, 874 F.3d 142 (3d Cir. 2017) (Roth, J.) (affirming district and bankruptcy court's dismissal of plaintiff's claims after finding plaintiff's attorney committed fraud on the court).

#### *Civil Procedure*

*Collins v. Mary Kay, Inc.*, 874 F.3d 176 (Restrepo, J.) (affirmed) (interpreting forum selection clause and holding state not federal law governed interpretation questions).

*Halley v. Honeywell International, Inc.*, 861 F.3d 481 (3d Cir. 2017) (Scirica, J.) (affirmed in part, vacated in part, and remanded) (affirming court's approval of settlement and attorney fee award but remanding to ask district court to explain with specificity why costs were awarded).

*Blanyar v. Genova Products Inc.*, 861 F.3d 426 (3d Cir. 2017) (Vanaskie, J.) (affirmed) (affirming dismissal of complaint because plaintiffs "did not exercise the reasonable diligence required for the discovery rule to toll the statute of limitations").

*Equal Employment Opportunity Commission v. City of Long Branch*, 866 F.3d 93 (3d Cir. 2017) (Chagares, J.) (vacated and remanded) (finding reversible procedural defect under Federal Magistrate's Act).

*City Select Auto Sales Inc. v. BMW Bank of North America Inc.*, 867 F.3d 434 (3d Cir. 2017) (Scirica, J.) (vacated and remanded) (concluding plaintiffs had adequately demonstrated Rule 23's ascertainability requirement to merit class certification) (Fuentes, J. concurring) (critiquing Third Circuit's treatment of ascertainability requirement).

*In re: Howmedica Osteonics Corp.*, 867 F.3d 390 (3d Cir. 2017) (Krause, J.) (vacated and remanded) (creating a four-step approach to determine

whether in which the reviewing court, whether the District Court in the first instance, or this Court on appeal, will consider in sequence: (1) the forum-selection clauses, (2) the private and public interests relevant to non-contracting parties, (3) threshold issues related to severance, and (4) which transfer decision most promotes efficiency while minimizing prejudice to non-contracting parties' private interests).

*In re Lipitor Antitrust Litigation*, 855 F.3d 126 (3d Cir. 2017) (Fisher, J.) (concluding jurisdiction appropriate in Third Circuit rather than Federal Circuit because "patent law neither creates plaintiffs' cause of action nor is a necessary element to any of plaintiffs' well-pleaded claims").

*Ramirez v. Vintage Pharmaceuticals, LLC*, 852 F.3d 324 (3d Cir. 2017) (Venaskie, J.) (reversed and remanded) (holding that the court properly exercised jurisdiction under the Class Action Fairness Act of 2005).

*Seneca Resources Corporation v. Township of Highland*, 863 F.3d 245 (3d Cir. 2017) (Smith, C.J.) (holding court did not abuse its discretion when denying intervenors motion for reconsideration).

*Mullin v. Balicki*, 875 F.3d 140 (3d Cir. 2017) (Fuentes, J.) (affirmed in part but reversing district court on grounds that it abused its discretion in denying plaintiff leave to amend complaint).

*Fahie v. Virgin Islands*, 858 F.3d 162 (3d Cir. 2017) (Jordan, J.) (holding in part that the Third Circuit had jurisdiction to hear appeal from Virgin Islands Supreme Court because of *North America Seafarers International Union ex rel. Bason v. Government of the Virgin Islands*, 767 F.3d 193, 205-06 (3d Cir. 2014) and it lacked power to overturn Bason absent en banc review). *Bason* was ultimately overturned by *Vooy's v. Bentley*, 901 F.3d 172 (3d Cir. 2018) when the court reconsidered the issue *en banc*.

*Rarick v. Federated Service Insurance Company*, 852 F.3d 223 (3d Cir. 2017) (Hardiman, J.) (issue of first impression) (holding that independent claim test is the standard district courts should use to review a complaint seeking both legal and declaratory relief).

*Reilly v. City of Harrisburg*, 858 F.3d 173 (3d Cir. 2017) (Ambro, J.) (vacated and remanded) (clarifying preliminary injunction analysis by distinguishing between critical and gateway factors, and holding that first two factors—reasonable probability of success and threat of irreparable harm—are most important).

*Susinno v. Work Out World Inc.*, 862 F.3d 346 (3d Cir. 2017) (Hardiman, J.) (reversed district court's dismissal of plaintiff's claims for lack of subject matter jurisdiction because the Telephone Consumer Protection Act "provides [plaintiff] with a cause of action, and her alleged injury is concrete").

*Taha v. County of Bucks*, 862 F.3d 292 (3d Cir. 2017) (Greenberg, J.) (affirming district court's motion for class certification because plaintiff sufficiently alleged injury under Pennsylvania's Criminal History Record Information Act).

*In re Flonase Antitrust Litigation*, 879 F.3d 61 (3d Cir. 2017) (Greenaway, J.) (issue of first impression) (concluding that Eleventh Amendment applies to class action settlements and held that because state of Louisiana had not waived sovereign immunity, it was not bound by a class settlement that prohibited class members from bringing separate suits against each other). A petition for certiorari has been docketed to the U.S. Supreme Court.<sup>184</sup>

#### *Commercial Law*

*Aliments Krispy Kernels, Inc. v. Nichols Farms*, 851 F.3d 283 (3d Cir. 2017) (Fuentes, J.) (vacated and remanded) (applying New Jersey choice of law rules to settle contract dispute and vacating district court's grant of summary judgment because factual issues precluded judgment as a matter of law).

*Finkelman v. National Football League*, 877 F.3d 504 (3d Cir. 2017) (Fuentes, J.) (reversing district court's motion to dismiss and holding that plaintiff had Article III standing to pursue claim against NFL and affiliated entities for withholding more than 5% of seats to the Super Bowl in violation of New Jersey law).

*James v. Global TelLink Corp.*, 852 F.3d 262 (3d Cir. 2017) (Hardiman, J.) (affirming district court's denial of motion to compel arbitration because appellees did not agree to be bound by the terms of use contained on the defendant's website and did not agree to arbitrate).

*White v. Sunoco, Inc.*, 870 F.3d 257 (3d Cir. 2017) (Chagares, J.) (interpreting South Dakota and Florida law and holding that plaintiff could not be forced to arbitrate under principles of equitable estoppel, affirming the district court) (Roth J. dissenting) (opining that under terms of an integrated contract, plaintiff could be forced to under basic contract interpretation principles).

#### *Corporate Law*

*Williams v. Globus Medical, Inc.*, 869 F.3d 235 (3d Cir. 2017) (Scirica, J.) (affirming district court's dismissal of claims alleged under the Securities Exchange Act).

*Norman v. Elkin*, 860 F.3d 111 (3d Cir. 2017) (Jordan, J.) (affirmed in part, vacated in part, remanded) (concluding that district court "erred in concluding that tolling of the statute of limitations is categorically inappropriate when a plaintiff has inquiry notice before initiating a books and records action in the Delaware courts").

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184. 879 F.3d 61 (3d Cir. 2017), *petition for cert. filed*, 2018 WL 3361039 (U.S. July 6, 2018) (No. 18-42).

*Federal Declaratory Judgment Actions*

*Kelly v. Maxum Specialty Insurance Group*, 868 F.3d 274 (3d Cir. 2017) (Chagares, J.) (reversed and remanded) (holding that when evaluating parallel claims under the Declaratory Judgment Act, “the mere potential or possibility that two proceedings will resolve related claims between the same parties is not sufficient to make those proceedings parallel; rather, there must be a substantial similarity in issues and parties between contemporaneously pending proceedings”).

*Fair Debt Collection Practices*

*Daubert v. NRA Group, LLC*, 861 F.3d 382 (3d Cir. 2017) (Fisher, J.) (affirmed in part, reversed and remanded in part) (affirming district court’s grant of summary judgment on Telephone Consumer Protection Act claim and reversing grant of summary judgment on the Fair Debt Collection Practices Act claim).

*Education*

*H.E. v. Walter D. Palmer Leadership Learning Partners Charter School*, 873 F.3d 406 (3d Cir. 2017) (Krause, J.) (reversed and remanded) (concluding that when plaintiff was a prevailing party under the individuals with Disabilities Education Act, it was entitled to attorney’s fees).

*Issa v. School District of Lancaster*, 847 F.3d 121 (3d Cir. 2017) (Fisher, J.) (issue of first impression) (holding that to allege a violation of the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f), an individual “must satisfy four elements: (1) the defendant must be an educational agency, (2) the plaintiff must face language barriers impeding her equal participation in the defendant’s instructional programs, (3) the defendant must have failed to take appropriate action to overcome those barriers, and (4) the plaintiff must have been denied equal educational opportunity on account of her race, color, sex, or national origin”).

*M.R. v. Ridley School District*, 868 F.3d 218 (3d Cir. 2017) (Krause, J.) (reversed and remanded) (issue of first impression) (holding that when a plaintiff prevails under the “stay put” provision of the Individuals with Disabilities Education Act (IDEA), a plaintiff may seek award of attorneys’ fees as the prevailing party).

*Wellman v. Butler Area School District*, 877 F.3d 125 (3d Cir. 2017) (Shwartz, J.) (vacated and remanded) (concluding under *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017), plaintiff did not exhaust administrative remedies prior to seeking relief under Individuals with Disabilities Education Act” and accordingly dismissing complaint with prejudiced).

*Election Law*

*American Civil Rights Union v. Philadelphia City Commissioners*, 872 F.3d 175 (3d Cir. 2017) (McKee, J.) (affirmed) (dismissing plaintiff’s suit seek-

ing to purge city voter rolls of convicted felons currently incarcerated because text of Section 8(a)(3) of the National Voter Registration Act “places no affirmative obligations on states (or voting commissions) to remove voters from the rolls”).

*Constitution Party of Pennsylvania v. Cortes*, 877 F.3d 480 (3d Cir. 2017) (Roth, J.) (vacated and remand) (explaining the district court erred by granting injunctive relief when it “did not make any factual findings or provide any explanation on the record of the factors it considered in determining that its injunction was appropriate”).

*Rodriguez v. 32nd Legislature of Virgin Islands*, 859 F.3d 199 (3d Cir. 2017) (Shwartz, J.) (affirmed in part, dismissed in part) (declining to intervene where Virgin Island law provided that legislature had sole authority to determine whether senator-elect possessed requisite qualifications to sit in the legislature).

#### *Energy*

*Estate of Ware v. Hospital of the University of Pennsylvania*, 871 F.3d 273 (3d Cir. 2017) (Ambro, J.) (affirmed) (clarifying reach of Price-Anderson Act, 42 U.S.C. § 2011, *et seq.*)

*McMunn v. Babcock & Wilcox Power Generation Group, Inc.*, 869 F.3d 246 (3d Cir. 2017) (Smith, C.J.) (affirming district court’s grant of summary judgment to defendants on plaintiff’s excessive radiation claims under the Price-Anderson Act).

#### *Fair Housing Act*

*Revoek v. Cowpet Bay West Condominium Association*, 853 F.3d 96 (3d Cir. 2017) (Restrepo, J.) (reversed in part, vacated in part) (issue of first impression) (holding “Fair Housing Act claims survive the death of a party”).

#### *False Claims Act*

*United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481 (3d Cir. 2017) (Hardiman, J.) (affirmed) (joining Ninth Circuit to interpret U.S. Supreme Court’s decision in *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016) and recognizing a “heightened materiality standard” when investigating the four elements of a False Claims Act violation).

*United States ex rel. Spay v. CVS Caremark Corporation*, 875 F.3d 746 (3d Cir. 2017) (McKee, J.) (affirmed) (issue of first impression) (explaining that there are “there are two prongs to [the government inference] defense: (1) the government knew about the alleged false statement(s), and (2) the defendant knew that the government knew.”).

*United States ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497 (3d Cir. 2017) (McKee, J.) (affirmed) (issue of first impression) (joining the Fifth and Ninth Circuits to hold that the Small Business Administration, when acting

as a receiver for a shareholder, does not act as the government, and may not raise a claim under the False Claims Act).

*International Child Abduction Remedies (ICARA)*

*Blackledge v. Blackledge*, 866 F.3d 169 (3d Cir. 2017) (Krause, J.) (affirmed) (hold that in international custody action under ICARA, the “retention date is the date beyond which the noncustodial parent no longer consents to the child’s continued habitation with the custodial parent and instead seeks to reassert custody rights, as clearly and unequivocally communicated through words, actions, or some combination thereof” and noting that the inquiry is fact-sensitive).

*Immigration*

*Alimbaev v. Attorney General of United States*, 872 F.3d 188 (3d Cir. 2017) (Krause, J.) (granting petition after Board of Immigration Appeals “misapplied the clearly erroneous standard in rejecting the [immigration judge’s] finding that [the petitioner’s] testimony was credible).

*Ildefonso-Candelario v. Attorney General of United States*, 866 F.3d 102 (3d Cir. 2017) (Stearns, J.) (issue of first impression) (applying the categorical approach to conclude that Pennsylvania criminal statute involving a “misdemeanor count of obstructing the administration of law or other governmental function” was not categorically a crime of moral turpitude).

*Mendoza-Ordonez v. Attorney General of United States*, 869 F.3d 164 (3d Cir. 2017) (Nygaard, J.) (petition granted in part and denied in part) (concluded case was “one of those rare instances” where withholding of removal should be granted because of “evidence of the politically motivated death threats, the inaction on [the plaintiff’s] complaints, a perpetrator and judge who shared a political affiliation in opposition to that of [plaintiff], and evidence of a politically corrupt justice system that failed to reign in politically motivated violence in Honduras” compels withholding of removal).

*Bamaca-Cifuentes v. Attorney General United States*, 870 F.3d 108 (3d Cir. 2017) (McKee, J.) (petition for review denied) (holding that “procedural requirements in 8 C.F.R. § 1003.2(c) apply with equal force to motions to reopen removal proceedings involving protection under the CAT”).

*Serrano-Alberto v. Attorney General United States*, 859 F.3d 208 (3d Cir. 2017) (Krause, J.) (petition granted) (concluding “that the Immigration Judge here denied Petitioner this fundamental right by actively preventing him from making his case for asylum, withholding of removal, and protection under the Convention Against Torture (CAT)”).

*Cazun v. Attorney General United States*, 856 F.3d 249 (3d Cir. 2017) (Rendell, J.) (affirmed) (holding that “aliens subject to reinstated removal orders are ineligible to apply for asylum”) (Hardiman, J. concurring) (offering different interpretation of statute but concurring in judgment)

*Flores v. Attorney General United States*, 856 F.3d 280 (3d Cir. 2017) (Fuentes, J.) (holding petitioner eligible for withholding of removal because “South Carolina accessory-after-the-fact conviction is not an offense “relating to obstruction of justice,” it cannot be considered either an “aggravated felony” or a “particularly serious crime” under the Immigration and Nationality Act”) (Shwartz, J. concurring in part and dissenting in part) (disagreeing with majority and opining “that South Carolina’s accessory after the fact offense is related to obstruction of justice, and it therefore qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(S)”).

*Myrie v. Attorney General United States*, 855 F.3d 509 (3d Cir. 2017) (Ambro, J.) (concluding Board of Immigration appeals erred by not reviewing immigration judge’s conclusion de novo).

*Chavez-Alvarez v. Attorney General United States*, 850 F.3d 583 (3d Cir. 2017) (Ambro, J.) (holding that sodomy conviction “cannot survive as a predicate ‘crime’ that triggers the pertinent removability provision of the INA”).

*Uddin v. Attorney General United States*, 870 F.3d 282 (3d Cir. 2017) (Rendell, J.) (holding that “unless the agency finds that party leaders authorized terrorist activity committed by its members, an entity such as the [Bangladesh National Party] cannot be deemed a Tier III terrorist organization”) (Greenaway, J. concurring) (joining the court’s opinion in full but writing separately to “clarify and expand on the meaning and scope of that holding and its necessary implications”).

*Mateo v. Attorney General United States*, 870 F.3d 228 (3d Cir. 2017) (Vanaskie, J.) (issue of first impression) (joining the Sixth, Ninth, and Eleventh circuits to hold that the definition of “crime of violence” under 18 U.S.C. § 16(b) is unconstitutionally vague for purposes of Immigration and Nationality Act’s definition of an aggravated felony) .

*Sang Goo Park v. Attorney General*, 846 F.3d 645 (3d Cir. 2017) (Fuentes, J.) (petition denied) (clarifying framework for “settled course” exception and holding that to invoke the exception “to [the court’s] rule against review of orders denying *sua sponte* reopening requests, a petitioner must establish that the [Board of Immigration Appeals (BIA)] has limited its discretion via a policy, rule, settled course of adjudication, or by some other method, such that the BIA’s discretion can be meaningfully reviewed for abuse”).

### *Insurance*

*General Refractories Company v. First State Insurance Co.*, 855 F.3d 152 (3d Cir. 2017) (Venaskie, J.) (reversed and remanded) (holding policy exclusion that prevents recovery on losses “arising out of asbestos” was unambiguous and requires “but for” causation).

*In re Trustees of Conneaut Lake Park, Inc.*, 855 F.3d 519 (3d Cir. 2017) (Hardiman, J.) (reversed and remanded) (issue of first impression) (hold-

ing the text of Section 638 of Pennsylvania's Insurance Code statute required the "named insured" to pay delinquent taxes).

#### *Intellectual Property*

*Covertch Fabricating, Inc. v. TVM Building Products, Inc.*, 855 F.3d 163 (3d Cir. 2017) (Krause, J.) (affirmed in part, vacated in part) (issue of first impression) (holding "that as between a manufacturer and its exclusive distributor, there is a rebuttable presumption of initial trademark ownership in favor of the manufacturer, and that [six-factor McCarthy] test is the proper analytical tool through which a distributor may attempt to rebut that presumption in the absence of a contractual agreement").

*Parks LLC v. Tyson Foods, Inc.*, 863 F.3d 220 (3d Cir. 2017) (Jordan, J.) (affirmed) (affirming district court's dismissal of false advertising claim and holding that geographic origin "must refer, at the very least, to the place of the origin of goods").

#### *Labor and Employment*

*Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61 (3d Cir. 2017) (Smith, C.J.) (affirmed in part, vacated in part, remanded) (rejecting approach adopted by Second, Sixth, and Eighth Circuits and concluding that under the Age Discrimination in Employment Act, subgroups may allege disparate impact claims).

*McGann v. Cinemark USA, Inc.*, 873 F.3d 218 (3d Cir. 2017) (Restrepo, J.) (issue of first impression) (holding that the ADA's requirement to provide "auxiliary aid or service" includes tactile interpreters at a movie theater).

*McNelis v. Pennsylvania Power & Light Company*, 867 F.3d 411 (3d Cir. 2017) (Hardiman, J.) (affirmed) (affirming district court's grant of summary judgment after analyzing regulations related to Americans with Disabilities Act and the regulations promulgated by the Nuclear Regulatory Commission).

*National Labor Relations Board v. New Vista Nursing and Rehabilitation*, 870 F.3d 113 (3d Cir. 2017) (Smith, C.J.) (remanded) (denying National Labor Relations Board petition for enforcement after it applied wrong standard to determine whether employer should have bargained with employee-nurses) (Greenaway, J. concurring in part and dissenting in part) (opining that opinion of the court misreads and misapplies Third Circuit precedent).

*Sikora v. UPMC*, 876 F.3d 110 (3d Cir. 2017) (Smith, C.J.) (affirmed) (affirming district court's grant of summary judgment after agreeing that plaintiff's plan was a "top hat" plan to which Employee Retirement Income Security Act (ERISA) did not apply).

*Secretary United States Department of Labor v. Kwasny*, 853 F.3d 87 (3d Cir. 2017) (McKee, J.) (affirmed and remanded) (affirming grant of sum-



mary judgment under ERISA because record showed no material issue of disputed fact).

*Trzaska v. L'Oreal USA, Inc.*, 865 F.3d 155 (3d Cir. 2017) (Ambro, J.) (reversed and remanded) (reversing district court's grant of motion to dismiss claim under New Jersey Conscientious Employee Protection Act (CEPA)) (Chagares, J. concurring in part and dissenting in part) (opining plaintiff had not stated a plausible claim under CEPA).

*Capps v. Mondelez Global, LLC*, 847 F.3d 144 (3d Cir. 2017) (Restrepo, J.) (affirmed) (affirming district court's grant of summary judgment and holding "that an employer's honest belief that its employee was misusing FMLA leave can defeat an FMLA retaliation claim").

*Helen Mining Company v. Elliott*, 859 F.3d 226 (3d Cir. 2017) (Krause, J.) (affirmed) (concluding that coal mine operators are subject to 20 C.F.R. § 718.305(d)(1) (2013)'s rebuttal standard "because the regulation permissibly fills a statutory gap" in the Black Lung Benefits Act (BLBA), a statute that "confers on coal workers generally the right to claim workers' compensation benefits for disabilities arising out of coal dust exposure").

*Jones v. Does 1-10*, 857 F.3d 508 (3d Cir. 2017) (Fuentes, J.) (affirmed) (dismissing claims under Fair Labor Standards Act after holding that parties should have submitted claims to arbitration first) (Ambro, J. dissenting) (disagreeing that arbitration was necessary).

*Castleberry v. STI Group*, 863 F.3d 259 (3d Cir. 2017) (Ambro, J.) (reversed and remanded) (reversed district court's dismissal of complaint and holding that plaintiffs stated plausible claim of discrimination under 42 U.S.C. § 1981).

*Moon v. Breathless Inc.*, 868 F.3d 209 (3d Cir. 2017) (Greenaway, J.) (reversed and remanded) (holding that arbitration clause in a signed employment contract did not cover statutory claims).

*Williams v. Pennsylvania Human Relations Commission*, 870 F.3d 294 (3d Cir. 2017) (Fuentes, J.) (affirmed) (holding that violations of Title VII and the ADA may not be brought under § 1983).

*Employer Trustees of Western Pennsylvania Teamsters v. Union Trustees of Western Pennsylvania Teamsters*, 870 F.3d 235 (3d Cir. 2017) (finding two disputes within parties' arbitration agreement and accordingly appointing arbitrator to resolve them).

*Dowling v. Pension Plan For Salaried Employees of Union Pacific Corporation and Affiliates*, 871 F.3d 239 (3d Cir. 2017) (Vanaskie, J.) (reversed and remanded) (interpreting retirement plan and concluding that "because the plan's terminology, silence, and structure render it ambiguous, the plan accords the plan administrator discretion to interpret ambiguous plan terms, and the mere existence of a conflict of interest is alone insufficient to raise skepticism of the plan administrator's decision, we will grant deference to the plan administrator and affirm").

*Souryavong v. Lackawanna County*, 872 F.3d 122 (3d Cir. 2017) (Vanaskie, J.) (affirmed) (affirming district court's grant of summary judgment

because defendant's failure to pay overtime was not willful under Fair Labor Standards Act).

*Zuber v. Boscov's*, 871 F.3d 255 (3d Cir. 2017) (Greenaway, J.) (reversed and remanded) (holding that former employee did not waive right "to assert claims under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2617 ("FMLA"), and Pennsylvania common law when [the former employee signed a Compromise and Release Agreement to settle his workers' compensation claims]").

*Secretary United States Department of Labor v. American Future Systems, Inc.*, 873 F.3d 420 (3d Cir. 2017) (McKee, J.) (affirmed) (concluding that "Fair Labor Standards Act does require employers to compensate employees for all rest breaks of twenty minutes or less").

*Fallon v. Mercy Catholic Medical Center of Southeastern Pennsylvania*, 877 F.3d 487 (3d Cir. 2017) (Roth, J.) (affirmed) (affirming district court's grant of summary judgment to defendant when plaintiff sued defendant under Title VII of the Civil Rights Act of 1964 and argued that his termination—which resulted from his refusal to take a flu shot on religious grounds—amounted to religious discrimination because while plaintiff's beliefs were "sincere and strongly held, were not religious in nature and, therefore, not protected by Title VII").

#### *Maritime Law*

*Matter of Christopher Columbus, LLC*, 872 F.3d 130 (3d Cir. 2017) (Stengel, J.) (reversed and remanded)<sup>185</sup> (holding that admiralty jurisdiction appropriate because in negligence case, alleged incident occurred aboard yacht that had sufficient potential to disrupt maritime commerce).

*Trotter v. 7R Holdings LLC*, 873 F.3d 435 (3d Cir. 2017) (Greenaway, J.) (affirmed) (holding district court properly dismissed a plaintiff's Jones Act and maritime claims pursuant to *forum non conveniens* and holding that "hold that the general presumption that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry").

*Joyce v. Maersk Line Ltd*, 876 F.3d 502 (3d Cir. 2017) (Jordan, J.) (affirmed) (overruling *Barnes v. Andover Co., L.P.*, 900 F.2d 630 (3d Cir. 1990) to hold that "a union contract freely entered by a seafarer—a contract that includes rates of maintenance, cure, and unearned wages—will not be reviewed piecemeal by courts unless there is evidence of unfairness in the collective bargaining process").

#### *Products Liability*

*In re Fosamax (Alendronate Sodium) Products Liability Litigation*, 852 F.3d 268 (3d Cir. 2017) (Fuentes, J.) (vacated and remanded) (clarifying appli-

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185. Lawrence F. Stengel, Chief District Judge for the United States District Court for the Eastern District of Pennsylvania, sat by designation.

cation *Wyeth v. Levine*, 555 U.S. 555 (2009), which “holds that state-law failure-to-warn claims are preempted when there is ‘clear evidence’ that the FDA would not have approved the warning that a plaintiff claims was necessary” by concluding that “clear evidence” is a standard of proof).

*In re Zoloft (Sertraline Hydrochloride) Products Liability Litigation*, 858 F.3d 787 (3d Cir. 2017) (Roth, J.) (affirming district court’s grant of summary judgment after finding it did not abuse its discretion in making various evidentiary rulings).

*In re: Asbestos Products Liability Litigation*, 873 F.3d 232 (3d Cir. 2017), cert granted, 138 S. Ct. 1990 (2018) (Vanaskie, J.) (issue of first impression) (splitting with the Sixth Circuit and at least one district court to hold that that a manufacturer could be liable if the asbestos related injury was a “reasonably foreseeable result of the manufacturer’s actions” in the context of a negligence claim).

#### *Homeowner’s Protection Act*

*Fried v. JP Morgan Chase & Co.*, 850 F.3d 590 (3d Cir. 2017) (Ambro, J.) (affirmed, remanded) (holding that under the Homeowners Protection Act, 12 U.S.C. § 4901, a mortgage servicer may not recalculate the length of the mortgage, and rather, the “end of the mortgage remains tied to the initial purchase price of the home”).

#### *Tax*

*Duquesne Light Holdings, Inc. & Subsidiaries v. Commissioner of Internal Revenue*, 861 F.3d 396 (3d Cir. 2017) (Ambro, J.) (affirmed) (concluding that the tax court properly applied the *Ilfeld* doctrine to grant summary judgement to the Internal Revenue Service) (Hardiman, J. dissenting).

*Hassen v. Government of Virgin Islands*, 861 F.3d 108 (3d Cir. 2017) (Shwartz, J.) (abrogating *Venen v. United States*, 38 F.3d 100 (3d Cir. 1994) and explaining that to recover damages for unauthorized tax collection, a provision requiring the exhaustion of administrative remedies prior to bringing such a claim is not jurisdictional).

*Rubel v. Commissioner of Internal Revenue*, 856 F.3d 301 (3d Cir. 2017) (Shwartz, J.) (holding 90-day deadline for certain tax filing was jurisdictional question).

*United States v. Cardaci*, 856 F.3d 267 (3d Cir. 2017) (Jordan, J.) (holding that marital home constituted property under federal tax lien statute, 26 U.S.C.A. § 6321).

#### *Title VII*

*Carvalho-Grevious v. Delaware State University*, 851 F.3d 249 (3d Cir. 2017) (Fisher, J.) (affirmed in part, reversed in part) (issue of first impression) (joining the Fourth Circuit to hold that in a Title VII employer retaliation claim a plaintiff need not establish but-for causation in prima facie case).

*Moody v. Atlantic City Board of Education*, 870 F.3d 206 (3d Cir. 2017) (Shwartz, J.) (holding district court erred in concluding individual was not plaintiff's supervisor for purposes of a sexual harassment claim) (Rendell, J. concurring in part and dissenting in part) (opining that Supreme Court's decision in *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2442 (2013) precludes finding that the individual was plaintiff's supervisor).

#### *Title IX*

*Doe v. Mercy Catholic Medical Center*, 850 F.3d 545 (3d Cir. 2017) (Fisher, J.) (affirmed in part, reversed in part) (holding that "a program or activity under § 1687 is an education program or activity under § 1681(a) if it has features such that one could reasonably consider its mission to be, at least in part, educational" and that "a private *quid pro quo* claim exists for employees of federally-funded education programs under Title IX").

#### *Transportation*

*In re Vehicle Carrier Services*, 846 F.3d 71 (3d Cir. 2017) (Shwartz, J.) (holding Shipping Act of 1984 preempted state consumer protection and unjust enrichment claims and barred certain Clayton Act claims).

*Norfolk Southern Railway Company v. Pittsburgh & West Virginia Railroad*, 870 F.3d 244 (3d Cir. 2017) (Vanaskie, J.) (evaluating conflict between lessor and lessees and affirming on various grounds).

#### *Government Contracting*

*Alpha Painting & Construction Co. Inc. v. Delaware River Port Authority of Pennsylvania and New Jersey*, 853 F.3d 671 (3d Cir. 2017) (Rendell, J.) (affirmed in part, vacated in part) (holding district court did not abuse its discretion by setting aside agency procurement decision because award was "illegal and irrational" under *Coco Bros. Inc. v. Pierce*, 741 F.2d 675, 679 (3d Cir. 1984) but vacated in part by remanding to district court to "fashion a more limited injunction").

#### *Section 1983 – First Amendment*

*De Ritis v. McGarrigle*, 861 F.3d 444 (3d Cir. 2017) (Krause, J.) (reversed and remanded) (concluding that First Amendment did not protect "statements made while performing official job responsibilities, speculative comments about the reason for a perceived demotion, and recklessly false rumors circulated to government officials" and accordingly dismissed First Amendment retaliation claim under § 1983).

*Mirabella v. Villard*, 853 F.3d 641 (3d Cir. 2017) (Restrepo, J.) (reversed) (reversing district court and granting motion to dismiss because sending "no contact" e-mail was not clearly established as First Amendment violation).

*Wisniewski v. Fisher*, 857 F.3d 152 (3d Cir. 2017) (Vanaskie, J.) (reversing district court's grant of motion to dismiss because inmate successfully alleged First Amendment claim under § 1983, creating a narrow exception under to rule that there is no First Amendment right to provide legal assistance to inmates).

*Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017) (Ambro, J.) (reversed and remanded) (issue of first impression) (concurring with the First, Fifth, Seventh, Ninth, and Eleventh Circuits in holding that "First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public") (Nygarrd, J., filed separate opinion concurring in part and dissenting in part).

#### *Section 1983 – Bivens*

*Vanderklok v. United States*, 868 F.3d 189 (3d Cir. 2017) (Jordan, J.) (reversed in part, remanded, appeal dismissed in part) (issue of first impression) (holding that "*Bivens* does not afford a remedy against airport security screeners who allegedly retaliate against a traveler who exercises First Amendment rights.").

#### *Section 1983 – Eighth Amendment*

*Wharton v. Danberg*, 854 F.3d 234 (3d Cir. 2017) (Greenaway, J.) (affirming grant of summary judgment to prison officials because no evidence demonstrated that failing to release prisoners timely did not amount to deliberate indifference under the Eighth Amendment).

*In Pearson v. Prison Health Service*, 850 F.3d 526 (3d Cir. 2017) (Fisher, J.) (issue of first impression) (affirming in part and reversing in part) (holding that medical expert testimony *may* be necessary in some Eighth Amendment adequacy of care claims but concluding that prisoner did not need to produce expert evidence to survive summary judgment on his adequacy of care claims or on his delayed or denied medical treatment claims).

*Palakovic v. Wetzel*, 854 F.3d 209 (3d Cir. 2017) (Smith, C.J.) (clarifying Circuit precedent to hold that "the vulnerability to suicide framework" established in prior cases applies "when a plaintiff seeks to hold prison officials accountable for failing to prevent a prison suicide" but does not "preclude other types of claims, even if those claims also relate to an individual who committed suicide while in prison").

#### *Section 1983 – False Arrest, Malicious Prosecution*

*Andrews v. Sculli*, 853 F.3d 690 (3d Cir. 2017) (Nygard, J.) (reversing district court's grant of summary judgment in favor of defendants on plaintiff's false arrest and malicious prosecution claims because district court erred in awarding defendants qualified immunity).

*Zimmerman v. Corbett*, 873 F.3d 414 (3d Cir. 2017), *cert denied*, 138 S. Ct. 2623 (2018) (McKee, J.) (reversing district court for denying judgment on the pleadings because plaintiff could not establish prima facie case of malicious prosecution).

*Section 1983 – Fourteenth Amendment*

*Allen v. DeBello*, 861 F.3d 433 (3d Cir. 2017) (Fuentes, J) (affirming district court that state court judges when acting in an adjudicatory rather than enforcement capacity were not proper defendants under § 1983).

*Borrell v. Bloomsburg University*, 870 F.3d 154 (3d Cir. 2017) (Hardiman, J.) (concluding program director of a joint partnership between a public university and private hospital was state actor for liability purposes under § 1983) (Roth, J. concurring in part) (opining plaintiff received process due to her and accordingly defendants were not liable under § 1983).

*Kedra v. Schroeter*, 876 F.3d 424 (3d Cir. 2017) (Krause, J.) (reversing district court's dismissal of § 1983 due process claim on qualified immunity grounds, finding law clearly established "an individual's right not to be subjected, defenseless, to a police officer's demonstration of the use of deadly force in a manner contrary to all applicable safety protocols.") (Fisher, J. concurring) (stating he would define the clearly established right more narrowly, as "as: a police officer's right not to be subjected to a firearms training in which the instructor acts with deliberate indifference, that is, consciously disregards a known risk of death or great bodily harm.").

*Steele v. Cicchi*, 855 F.3d 494 (3d Cir. 2017) (Restrepo, J) (affirmed) (issue of first impression) (joining Tenth and Eleventh Circuits by holding detainee had protected liberty interest in exercising bail option once bail was set).

*Davenport v. Borough of Homestead*, 870 F.3d 273 (3d Cir. 2017) (Fisher, J.) (issue of first impression) (joining the "the majority of circuits in holding that a passenger shot by an officer during the course of a vehicular pursuit may seek relief under the Fourth Amendment" and thus the claim should not be analyzed under "the more generalized notion of 'substantive due process' protected by the Fourteenth Amendment").

*Section 1983 – Qualified Immunity*

*Barna v. Board of School Directors of Panther Valley School District*, 877 F.3d 136 (3d Cir. 2017) (Chagares, J.) (affirmed in part, vacated in part, remanded) (holding that right "right to participate in school board meetings despite engaging in a pattern of threatening and disruptive behavior" was not clearly established and accordingly awarded qualified immunity to defendants).

*Mann v. Palmerton Area School District*, 872 F.3d 165 (3d Cir. 2017) (Vanaskie, J.) (affirmed) (holding right "to be free from deliberate expo-

sure to a traumatic brain injury after exhibiting signs of a concussion in the context of a violent contact sport” was not clearly established for purposes of § 1983 liability and accordingly awarding defendant qualified immunity).

*Williams v. Secretary Pennsylvania Department of Corrections*, 848 F.3d 549 (3d Cir. 2017) (McKee, J.) (issue of first impression) (affirming district court’s grant of summary judgment to prison officials but finding prisoners have clearly established right to avoid prolonged solitary detention on death row).

### *Standing*

*Cottrell v. Alcon Laboratories*, 874 F.3d 154 (3d Cir. 2017) (Restrepo, J.) (reversing district court’s dismissal of class action alleging violation of consumer protection statutes because plaintiffs had standing) (Roth, J. dissenting) (opining that plaintiffs’ injury too speculative to confer standing).

*In re Horizon Healthcare Services Inc. Data Breach Litigation*, 846 F.3d 625 (3d Cir. 2017) (Jordan, J.) (vacated and remanded) (explaining that “violation of Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681, *et seq.*, gives rise to an injury sufficient for Article III standing purposes”) (Shwartz, J. concurring in judgment) (agreeing that plaintiffs have standings but under alternate theory).

*Knick v. Township of Scott*, 862 F.3d 310 (3d Cir. 2017) (Smith, J.) (holding plaintiff lacked constitutional standing to pursue Fourth and Fifth Amendment claims). The U.S. Supreme Court has granted certiorari in this case to determine whether the Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985) that requires “property owners to exhaust state court remedies to ripen federal takings claims.”<sup>186</sup>

*Marathon Petroleum Corporation v. Secretary of Finance for Delaware*, 876 F.3d 481 (3d Cir. 2017) (Jordan, J.) (vacated and remanded) (reversing district court’s grant of motion to dismiss action against Delaware state officials involving escheat disputes because company had standing).

*Plains All American Pipeline L.P. v. Cook*, 866 F.3d 534 (3d Cir. 2017) (Fisher, J.) (affirmed in part, reversed in part) (reversing district court’s grant of motion to dismiss procedural due process claim under Delaware escheats law because of ripeness issues).

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186. *Knick v. Twp. of Scott*, 138 S. Ct. 1262 (2018). See *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., joined by O’Connor, Kennedy, and Thomas, JJ., concurring in judgment).

*United States Housing Act*

*Hayes v. Harvey*, 874 F.3d 98 (3d Cir. 2017) (Fisher, J.) (Greenaway, J. dissenting) (holding that United States Housing Act of 1937's enhanced voucher provision, 42 U.S.C. § 1437f(t) did not create an enforceable "right to remain in their unit as long as it is offered for rental housing"). This decision was later vacated in 2018 in *Hayes v. Harvey*, 903 F.3d 32 (3d Cir. 2018).

## CRIMINAL MATTERS

*Issues of First Impression*

FEDERAL HABEAS PETITIONS & CROSS-APPEAL JURISDICTION – In *Mathias v. Frackville SCI*,<sup>187</sup> the Third Circuit joined the D.C., Second, and Ninth Circuits to hold that Federal Rule of Appellate Procedure 4(a)(3) is not jurisdictional.<sup>188</sup> It also established the factors under which a court may determine whether waiver of Rule 4(a)(3) is appropriate in the interests of justice. Those factors include, "whether the issues substantially overlap such that severance may be inefficient or create an absurd result; whether good reason exists for the delay in filing; and whether there are extenuating circumstances present in the case that otherwise warrant relief."<sup>189</sup> Finally, the court held that a Certificate of Appeal is "mandatory for a petitioner seeking to take a cross-appeal."<sup>190</sup> Judge Krause wrote on behalf of Judge Fisher and Judge Melloy.

FORFEITURE – In *United States v. Gjeli*,<sup>191</sup> the Third Circuit evaluated whether defendants could be held jointly and severally liable under a criminal forfeiture statute, 18 U.S.C. § 1963, and a civil forfeiture statute, 18 U.S.C. § 981(a)(1)(C).<sup>192</sup> Judge Jordan, writing on behalf of Judge Krause and Judge Stearns,<sup>193</sup> concluded that the U.S. Supreme Court's decision in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017) answered this question in the negative, and that "[f]orfeiture . . . is limited to property [each] defendant himself actually acquired as the result of the crime."<sup>194</sup> The court concluded that *Honeycutt* effectively overruled the Third Circuit's prior decision in *United States v. Pitt*.<sup>195</sup>

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187. 876 F.3d 462 (3d Cir. 2017) (Krause, J.), amending and superseding, 869 F.3d 175 (reversed in part and appeal dismissed in part).

188. *Id.* at 472.

189. *Id.* at 472–73.

190. *Id.* at 474.

191. 867 F.3d 418 (3d Cir. 2017) (Jordan, J.) (affirmed in part, vacated in part, remanded).

192. *Id.* at 427.

193. Honorable Richard G. Stearns, United States District Court Judge for the District of Massachusetts, sat by designation.

194. *Id.* at 428.

195. 193 F.3d 751 (3d Cir. 1999).



HABEAS – SENTENCING ERROR – In *Gardner v. Warden Lewisburg USP*,<sup>196</sup> the Third Circuit held that 28 U.S.C. § 2255 is an “adequate and effective means to adjudicate a claim of sentencing error” under *Alleyne v. United States*, 133 S. Ct. 2151, (2013).<sup>197</sup> Judge Hardiman writing on behalf of Judge McKee and Judge Rendell also held that *Alleyne* claims may not be brought under 28 U.S.C. § 2241, the general habeas statute.<sup>198</sup>

HABEAS – PERJURED TESTIMONY – In *Haskell v. Superintendent Greene SCI*,<sup>199</sup> the Third Circuit evaluated a habeas petition under § 2254 that alleged the defendant’s conviction was tainted by perjured testimony.<sup>200</sup> The Third Circuit had to determine under which standard to evaluate the harm the defendant incurred. Rejecting the positions taken by the First, Sixth, Eighth, and Eleventh Circuits and joining the Ninth, Judge Ambro, writing for Judge Vanaskie and Restrepo, held that “the actual-prejudice standard of *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993) does not apply to claims on *habeas* that the state has knowingly presented or knowingly failed to correct perjured testimony” and “a reasonable likelihood that the perjured testimony affected the judgment of the jury is all that is required.”<sup>201</sup>

HABEAS – SECOND OR SUCCESSIVE PETITIONS – In *In re Hoffner*,<sup>202</sup> the Third Circuit evaluated what “is required for a claim to ‘rel[y]’ on a qualifying new rule” to satisfy the requirements of § 2255(h)(2),” which allows habeas petitioners to file second or successive habeas petitions.<sup>203</sup> Judge Restrepo, writing on behalf of Judge McKee and Judge Ambro, held that “whether a claim ‘relies’ on a qualifying new rule must be construed permissively and flexibly on a case-by-case basis.”<sup>204</sup> The court joined the Second, Sixth, Fourth and Tenth Circuits to authorize second or successive habeas petitions that challenge the Armed Career Criminal Act’s (ACCA) residual clause in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held ACCA’s residual clause to be unconstitutionally vague.<sup>205</sup>

INEFFECTIVE ASSISTANCE OF COUNSEL – In *McKernan v. Superintendent Smithfield SCI*,<sup>206</sup> the Third Circuit instructed the district court to grant a defendant’s habeas petition after concluding that when counsel for defendant failed to recognize the judge’s lack of impartiality, that failure constituted ineffective assistance of counsel.<sup>207</sup> Writing on behalf of Judge

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196. 845 F.3d 99 (3d Cir. 2017) (Hardiman, J.).

197. *Id.* at 100.

198. *Id.* at 101–02.

199. 866 F.3d 139 (3d Cir. 2017) (Ambro, J.) (reversed).

200. *Id.* at 142.

201. *Id.* at 152.

202. 870 F.3d 301 (3d Cir. 2017) (Restrepo, J.).

203. *Id.* at 308.

204. *Id.* at 308.

205. *Id.* at 312.

206. 849 F.3d 557 (3d Cir. 2017) (Roth, J.) (reversed and remanded).

207. *Id.* at 559–60.

Fisher and Greenaway, Judge Roth also held that the “right to an impartial trial extends to a bench trial, and that such right cannot be waived by a defendant.”<sup>208</sup> Judge Roth reasoned that “considering the myriad procedural safeguards in place to avoid the seating of even one biased juror, out of twelve, it is inconceivable that, during a bench trial when the judge is the sole factfinder, a trial may proceed when that judge is biased.”<sup>209</sup>

SENTENCING – CATEGORICAL APPROACH – ROBBERY – In *United States v. Graves*,<sup>210</sup> the Third Circuit determined whether a defendant’s state robbery conviction served as a predicate offense for his designation as a career offender under U.S.S.G. § 4B1.1.<sup>211</sup> Writing on behalf of Judge Hardiman and Judge Fisher, Judge Roth joined the Seventh and Eleventh Circuits to “hold that generic robbery requires no more than *de minimis* force.”<sup>212</sup> The Court also agreed with the Sixth and Ninth Circuit to hold that “the most important factor in defining the generic version of an offense is the approach of the majority of state statutes defining the crime.”<sup>213</sup> Accordingly, for sentencing purposes, the court concluded that “generic federal robbery is defined as it is in the majority of state robbery statutes, without the requirement of more than *de minimis* force.”<sup>214</sup>

SENTENCING – CATEGORICAL APPROACH – BURGLARY – The U.S. Supreme Court on a “grant, vacate, and remand” order instructed the Third Circuit to take up *United States v. Steiner*<sup>215</sup> and determine whether the defendant’s predicate offense—a Pennsylvania burglary conviction—was a “violent felon[y] under the Armed Career Criminal Act, 18 U.S.C. § 924(e).”<sup>216</sup> Judge Fuentes, writing on behalf of Judges Jordan and Vanaskie, concluded that under the categorical approach, “a conviction under the Pennsylvania burglary statute in question is not a predicate § 4B1.2 ‘crime of violence’ and accordingly should not have been used to ‘enhance [the defendant’s] sentence.’”<sup>217</sup>

SENTENCING – SUBSTANTIAL FINANCIAL HARDSHIP – In *United States v. Poulson*,<sup>218</sup> the Third Circuit joined the Seventh and Eighth Circuits to find that “substantial financial hardship” component of the sentencing enhancement in U.S.S.G. § 2B1.1(b)(2)(A)–(C) is “subject to the usual—and significant—degree of discretion afforded a district court during sentencing.” Writing on behalf of Judge McKee and Vanaskie, Judge Rendell

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208. *Id.* at 565.

209. *Id.*

210. 877 F.3d 494 (3d Cir. 2017) (Roth, J.).

211. *Id.* at 500–01.

212. *Id.* at 503.

213. *Id.* at 504.

214. *Id.*

215. 847 F.3d 103 (3d Cir. 2017) (Fuentes, J.) (affirmed in part, vacated in part, remanded).

216. *Id.* at 117.

217. *Id.* at 120.

218. 871 F.3d 261 (3d Cir. 2017) (Rendell, J.).

reasoned because the sentencing enhancement requires an individualized assessment, “‘substantial financial hardship’ is measured on a sliding scale that is also fairly subjective.”<sup>219</sup>

SENTENCING – SUFFICIENTLY ANALOGOUS OFFENSES – In *United States v. Jackson*,<sup>220</sup> the Third Circuit considered how a district court, pursuant to U.S.S.G. § 2X5.1, should sentence a convicted felon when no guideline has been promulgated as to the defendant’s offense.<sup>221</sup> In those circumstances, district courts should apply the guideline offense “most analogous” to that which the defendant committed.<sup>222</sup> The court joined the Fifth, Eighth, and Tenth circuits to adopt an “elements-based approach,” which “calls for a comparison between the elements of the offense of conviction with the purportedly analogous offense guideline and the elements of the various federal offenses covered by this guideline.”<sup>223</sup> Judge Cowen, joined by Judge Fuentes, then remanded the case for resentencing after concluding the district court erred in determining what constituted a sufficiently analogous offense.<sup>224</sup> Judge McKee dissented, arguing that the district court’s sentences were appropriate.<sup>225</sup>

SENTENCING – CALCULATING GUIDELINE RANGE – In *United States v. Martin*,<sup>226</sup> the Third Circuit considered whether the appropriate guideline range under which to sentence a defendant is the agreed-upon guideline range in a plea agreement.<sup>227</sup> Judge Hardiman, writing on behalf of Judge Fisher and Judge Roth, joined the Second and Ninth Circuits in concluding that the appropriate range is that which is established by the court.<sup>228</sup> Thus, even if the government and the defendant stipulate to a lower guideline range—e.g., the lowered drug guidelines—that agreement does not preclude the court from setting the guideline range at career offender levels.<sup>229</sup>

SENTENCING – INTERVENING ARRESTS – In *United States v. Ley*,<sup>230</sup> the Third Circuit interpreted what constitutes an “intervening arrest” when calculating a defendant’s criminal history under the Sentencing Guidelines.<sup>231</sup> Judge Fisher, on behalf of Judge Hardiman and Judge Roth, held that under U.S.S.G. § 4A1.2(a)(2), “an arrest is a formal, custodial arrest.”<sup>232</sup> The court joined the Sixth, Ninth, and Eleventh Circuits in mak-

219. *Id.* at 268.

220. 862 F.3d 365 (3d Cir. 2017) (Cowen, J.) (McKee, dissenting).

221. *Id.* at 372.

222. *Id.*

223. *Id.* at 371.

224. *Id.* at 394.

225. *Id.* at 415.

226. 867 F.3d 428 (3d Cir. 2017) (Hardiman, J.) (affirmed).

227. *Id.* at 429.

228. *Id.* at 432.

229. *Id.* at 433.

230. 876 F.3d 103 (3d Cir. 2017) (Fisher, J.) (vacated and remanded).

231. *Id.* at 106.

232. *Id.* at 109.

ing such a determination, and split with the Seventh Circuit.<sup>233</sup> The Seventh Circuit has held that traffic stops constitute arrests for sentencing purposes.<sup>234</sup>

**SUPERVISED RELEASE** – In *United States v. Johnson*,<sup>235</sup> the Third Circuit considered whether one court's revocation of supervised release may terminate supervised release for a separate conviction.<sup>236</sup> Judge Fuentes, writing for Judge Greenaway and Judge Schwartz, answered this question in the negative, and the court joined the Second and Fifth Circuits to “reject[ ] the model of merged terms of supervised release.”<sup>237</sup>

#### *En Banc*

**SENTENCING – ABUSED POSITION OF PUBLIC TRUST** – In *United States v. Douglas*,<sup>238</sup> the Third Circuit considered whether an airport employee convicted of using his security clearance to smuggle drugs was subject to the two-level sentencing enhancement under U.S.S.G. § 3B1.3 because he “abused a position of public or private trust.”<sup>239</sup> Although the Third Circuit at first concluded that the defendant was subject to the enhancement, the court vacated its judgment when the court reheard the case en banc, and set established new parameters to determine whether the two-level sentencing enhancement applies to future cases.<sup>240</sup> The court followed an approach previously taken by the Seventh Circuit.<sup>241</sup>

#### *Split Decisions*

**FOURTH AMENDMENT – CELL PHONE LOCATION DATA** – In *United States v. Stimler*,<sup>242</sup> the Third Circuit considered, among other issues raised by defendants, whether the district court should have excluded historical cell site location information evidence (CSLI) used by the government.<sup>243</sup> Writing on behalf of Judge Chagares and Judge Restrepo, Judge Roth explained that the third-party doctrine, which removes the cloak of privacy

233. *Id.*

234. *Id.* (citing *United States v. Morgan*, 354 F.3d 621, 623–24 (7th Cir. 2003)).

235. 861 F.3d 474 (3d Cir. 2017) (Fuentes, J.) (affirmed).

236. *Id.* at 476–79.

237. *Id.* at 478.

238. 849 F.3d 40 (3d Cir. 2017), rev'd and remanded after hearing en banc, 885 F.3d 124 (3d Cir. 2018).

239. *Douglas*, 849 F.3d at 47.

240. *United States v. Douglas*, 885 F.3d 124 (3d Cir. 2018).

241. *Id.* at 197–98 (citing *United States v. Davis*, 793 F.3d 712 (7th Cir. 2015) (en banc)).

242. 864 F.3d 253 (3d Cir. 2017) (Roth, J.) (affirmed) (Restrepo, J.) (concurring in part and concurring in the judgment), *reh'g granted*, *United States v. Goldstein*, 902 F.3d 411 (3d Cir. 2018) (Mem) (ordering parties to provide supplemental briefing in light of Supreme Court's decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018)).

243. *Id.* at 261.

on individual's private data when shared with a third-party, does not apply to CSLI "because cell phone users do not voluntarily disclose CSLI to their service providers simply by signing a service contract."<sup>244</sup> Nevertheless, the court held that under Supreme Court and Third Circuit precedent, "the Fourth Amendment is not violated when the government has shown 'reasonable grounds to believe that the . . . records [including CSLI data] . . . are relevant and material to an ongoing criminal investigation.'"<sup>245</sup>

Judge Restrepo wrote a separate opinion to concur in part and concur in the judgment. In sum, he disagreed with the court's opinion that a Fourth Amendment Violation did not occur. According to Judge Restrepo, "the Government obtaining 57 days of aggregated CSLI with only a § 2703(d) order supported by reasonable suspicion is, in this case, a warrantless search that violates the Fourth Amendment."<sup>246</sup>

In 2018, the court granted a petition for a panel rehearing<sup>247</sup> in light of Supreme Court's decision in *Carpenter v. United States*.<sup>248</sup> In *Carpenter*, the Supreme Court held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI."<sup>249</sup>

MOTION FOR DISCOVERY – CLAIM OF UNCONSTITUTIONAL SELECTIVE ENFORCEMENT – In *United States v. Washington*,<sup>250</sup> the defendant appealed the district court's denial of the defendant's motion for pretrial discovery based on a selective enforcement or prosecution claim.<sup>251</sup> The Third Circuit concluded that the district court erred in applying too strict a standard in denying the defendant's motion.<sup>252</sup> Writing on behalf of Judge McKee and Judge Cowen, Judge Fuentes held that district courts may adopt a more flexible approach to determine whether claims of selective law enforcement necessitate pretrial discovery.<sup>253</sup> Judge McKee wrote a separate opinion concurring in the majority's ruling on the defendant's selective enforcement claim, but dissenting on another aspect of the defendant's sentencing claim because of the unique circumstances of the case.<sup>254</sup>

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244. *Id.* at 262–64.

245. *Id.* at 266–67.

246. *Id.* at 175.

247. *United States v. Goldstein*, 902 F.3d 411 (3d Cir. 2018) (Mem).

248. 138 S. Ct. 2206 (2018).

249. *Id.* at 2217.

250. 869 F.3d 193 (3d Cir. 2017) (Fuentes, J.) (McKee, J. dissenting).

251. *Id.* at 213.

252. *Id.* at 213, 220.

253. *Id.* at 220–21.

254. *Id.* at 223–34.

PRISONER LITIGATION REFORM ACT – IN FORMA PAUPERIS – In *Millhouse v. Heath*,<sup>255</sup> the Third Circuit evaluated whether a prisoner was entitled to proceed in forma pauperis for the purposes of his appeal.<sup>256</sup> Judge Cohen, writing on behalf of Judge Ambro and Judge Restrepo, stated that to evaluate in forma pauperis status, the court “must look to the date the notice of appeal is filed—and not the date that the Court rules on a prisoner’s motion to proceed IFP—in assessing whether a particular dismissal counts as a strike. In short, strikes that accrue before the filing of the notice of appeal count—while strikes that accrue after the notice of appeal is filed do not.”<sup>257</sup> Judge Ambro wrote separately “to disagree with [his] colleagues’” interpretation of the Prisoner Litigation Reform Act (“PLRA”) and their conclusion that *Heath II* does not count as a strike” and to “agree that [the plaintiff] only has one strike for the purpose of this appeal and thus his case should be remanded.”<sup>258</sup>

SENTENCING – CRIME OF VIOLENCE – In *United States v. Chapman*,<sup>259</sup> the Third Circuit considered whether a defendant’s prior conviction under 18 U.S.C. § 876(c)—“which proscribes mailing a communication containing a threat to injure the person of the addressee or of another—is a crime of violence that merits the career offender sentencing enhancement under the sentencing guidelines.”<sup>260</sup> Judge Greenaway, writing on behalf of Judge Jordan and Judge Rendell, applied the categorical approach and concluded that it was.<sup>261</sup> Judge Jordan concurred with the opinion, but wrote separately to express his “dismay at the ever-expanding application of the categorical approach.”<sup>262</sup>

SENTENCING – SUFFICIENTLY ANALOGOUS OFFENSES – In *United States v. Jackson*,<sup>263</sup> the Third Circuit considered how a district court, pursuant to U.S.S.G. § 2X5.1, should sentence a convicted felon when no guideline has been promulgated as to the defendant’s offense.<sup>264</sup> In those circumstances, district courts should apply the guideline offense “most analogous” to that which the defendant committed.<sup>265</sup> The court joined the Fifth, Eighth, and Tenth circuits to adopt an “elements-based approach,” which “calls for a comparison between the elements of the offense of conviction with the purportedly analogous offense guideline and the elements

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255. 866 F.3d 152 (3d Cir. 2017) (Cowen, J.) (Ambro, J. dissenting in part and concurring in the judgment).

256. *Id.* at 153–54.

257. *Id.* at 154.

258. *Id.* at 164–65.

259. 866 F.3d 129 (3d Cir. 2017) (Greenaway, J.) (Jordan, J. concurring) (affirmed).

260. *Id.* at 130.

261. *Id.* at 133–36.

262. *Id.* at 136.

263. 862 F.3d 365 (3d Cir. 2017) (Cowen, J.) (McKee, dissenting).

264. *Id.* at 372.

265. *Id.*

of the various federal offenses covered by this guideline.”<sup>266</sup> Judge Cowen, joined by Judge Fuentes, then remanded the case for resentencing after concluding the district court erred in determining what constituted a sufficiently analogous offense.<sup>267</sup> Judge McKee dissented, arguing that the district court’s sentences were appropriate.<sup>268</sup>

*Appendix of Precedential Criminal Opinions*

*Anti-Terrorism and Effective Death Penalty Act*

*Coleman v. Greene*, 845 F.3d 73 (3d Cir. 2017) (Hardiman, J.) (affirmed) (declining to hear habeas petition beyond one-year statute of limitations when defendant could not satisfy the “actual innocence requirement of the fundamental miscarriage of justice exception to AEDPA”).

*Appellate Procedure*

*Mathias v. Superintendent Frackville SCI*, 876 F.3d 462 (3d Cir. 2017) (Krause, J.) (reversed in part; appeal dismissed in part) (issue of first impression) (holding Federal Rule of Appellate Procedure 4(a)(3) is not jurisdictional, establishing factors under which a court may determine whether waiver of Rule 4(a)(3) is appropriate in the interests of justice, and holding that a Certificate of Appeal is “mandatory for a petitioner seeking to take a cross-appeal.”).

*Contempt*

*United States v. Apple MacPro Computer*, 851 F.3d 238 (3d Cir. 2017) (Vanaski, J.), *cert denied*, 138 S. Ct. 1988 (2018) (affirming magistrate judge’s decision hold defendant in contempt after defendant flouted court order to turn over computer materials to government in decrypted state).

*Criminal Motions, Motion to Suppress*

*Satterfield v. District Attorney Philadelphia*, 872 F.3d 152 (3d Cir. 2017) (Vanaskie, J.) (vacated and remanded) (holding that when considering a “Rule 60(b)(6) motion premised on a change in decisional law [the district court] must examine the full panoply of equitable circumstances in the particular case before rendering a decision” in order to comply with in *McQuiggin v. Perkins*, 569 U.S. 383 (2013)).

*United States v. Washington*, 869 F.3d 193 (3d Cir. 2017) (Fuentes, J.) (McKee, J. dissenting) (establishing flexible approach for district courts to use to whether claims of selective law enforcement necessitate pretrial discovery).

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266. *Id.* at 371.

267. *Id.* at 394.

268. *Id.* at 415.

*United States v. Jackson*, 849 F.3d 540 (3d Cir. 2017) (Greenberg, J.) (affirmed) (joining D.C., Fifth, Eighth and Tenth Circuits to adopt “listening post” theory, which provides that under Title III of the Omnibus Crime Control and Safe Streets Act, “either the interception of or the communications themselves must have been within the judge’s territorial jurisdiction” to avoid suppression).

#### *Double Jeopardy*

*United States v. Hodge*, 870 F.3d 184 (3d Cir. 2017) (Chagares, J.) (affirmed in part, reversed in part, remanded) (concluding defendant’s multiple convictions under a single Virgin Islands statute, 14 V.I.C. § 2253(a), violated double jeopardy).

#### *Due Process*

*United States v. Fattah*, 858 F.3d 801 (3d Cir. 2017) (Smith, J.) (affirming conviction and holding that although FBI agent acted wrongfully by leaking information to press regarding the investigation, the FBI agent’s actions did not violate due process).

#### *Forfeiture*

*United States v. Gjeli*, 867 F.3d 418 (3d Cir. 2017) (Jordan, J.) (affirmed in part, vacated in part, remanded) (issue of first impression) (concluding that *United States v. Pitt*, 193 F.3d 751 (3d Cir. 1999) was effectively overturned by *Honeycutt v. United States*, 137 S. Ct. 1626 (2017) and holding that joint and several liability cannot be imposed in criminal or civil forfeiture statute because “[f]orfeiture . . . is limited to property [each] defendant himself actually acquired as the result of the crime”).

#### *Fourth Amendment*

*United States v. Stimler*, 864 F.3d 253 (3d Cir. 2017) (Roth, J.) (affirmed) (Restrepo, J.) (concurring in part and concurring in the judgment) (concluding that government use of excluded historical cell site location information did not amount to warrantless search). A panel rehearing has been granted in his case.<sup>269</sup>

*United States v. Wrensford*, 866 F.3d 76 (3d Cir. 2017) (Shwartz, J.), *cert denied*, 138 S. Ct. 1566 (2018) (affirmed in part, vacated in part, remanded) (concluding facts showed defendant’s de facto arrest was unsupported by probable cause and remanding to district court to determine whether evidence following arrest requires suppression).

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269. *United States v. Goldstein*, 902 F.3d 411 (3d Cir. 2018) (Mem) (ordering parties to provide supplemental briefing in light of Supreme Court’s decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018)).



*Grand Jury*

*In re Grand Jury Matter #3*, 847 F.3d 157 (3d Cir. 2017) (per curiam) (concluding that as long as a live controversy remains and the grand jury proceedings continue, an appellate court retains jurisdiction over an appeal of an evidentiary ruling in a grand jury proceeding, even after that grand jury returns an indictment and superseding indictment).<sup>270</sup>

*Habeas Petitions*

*Bruce v. Warden Lewisburg USP*, 868 F.3d 170 (3d Cir. 2017) (Fisher, J.) (affirmed) (concluding district court had jurisdiction to consider defendant's actual innocence claim under 28 U.S.C. § 2241).

*Gardner v. Warden Lewisburg USP*, 845 F.3d 99 (3d Cir. 2017) (Hardiman, J.) (issue of first impression) (holding that 28 U.S.C. § 2255 is an "adequate and effective means to adjudicate a claim of sentencing error under *Alleyne v. United States*, 133 S. Ct. 2151, (2013)").

*Haskell v. Superintendent Greene SCI*, 866 F.3d 139 (3d Cir. 2017) (Ambro, J.) (reversed) (issue of first impression) (granting habeas petition holding that "the actual-prejudice standard of *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993) does not apply to claims on *habeas* that the state has knowingly presented or knowingly failed to correct perjured testimony" and "a reasonable likelihood that the perjured testimony affected the judgment of the jury is all that is required").

*In re Hoffner*, 870 F.3d 301 (3d Cir. 2017) (Restrepo, J.) (issue of first impression) (holding that "whether a claim 'relies' on a qualifying new rule must be construed permissively and flexibly on a case-by-case basis" and joining Second, Sixth, Fourth and Tenth Circuits to authorize second or successive habeas petitions under 28 U.S.C. § 2255(h) that challenge the Armed Career Criminal Act's residual clause in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held the residual clause to be unconstitutionally vague).

*Johnson v. Lamas*, 850 F.3d 119 (3d Cir. 2017) (Rendell, J.) (affirmed) (concluding that stipulated violation of Sixth Amendment's right to confront witnesses was harmless under the circumstances).

*Wilkerson v. Superintendent Fayette SCI*, 871 F.3d 221 (3d Cir. 2017) (Krause, J.) (affirmed in part, reversed in part, remanded) (concluding that although defendant adequately exhausted double jeopardy claim and was therefore entitled to pursue habeas relief under 28 U.S.C. § 2254, district court's conclusion that no double jeopardy violation occurred was reasonable).

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270. This case was reheard en banc and the earlier opinion, 841 F.3d 177, vacated and superseded on rehearing.

*Jury Issues*

*United States v. Brown*, 849 F.3d 87 (3d Cir. 2017) (Jordan, J.) (affirmed) (holding that use of dual juries is not per se unconstitutional under the due process clause of the Fifth Amendment and the Sixth Amendment right to an impartial jury).

*United States v. Penn*, 870 F.3d 164 (3d Cir. 2017) (Smith, C.J.) (affirmed) (holding the district court did not abuse its discretion to remove a juror and replace him with alternate under Federal Rule of Criminal Procedure 24(c)(1)).

*Prisoner Litigation Reform Act*

*Gillette v. Prosper*, 858 F.3d 833 (3d Cir. 2017) (Hardiman, J.) (holding Third Circuit lacked jurisdiction to review district court's denial of a prisoner's petition under the Prisoner Litigation Reform Act because district court's order was not a final judgment).

*Millhouse v. Heath*, 866 F.3d 152 (3d Cir. 2017) (Cowen, J.) (holding that a court "must look to the date the notice of appeal is filed—and not the date that the Court rules on a prisoner's motion to proceed IFP—in assessing whether a particular dismissal counts as a strike") (Ambro, J. dissenting in part and concurring in the judgment).

*Parker v. Montgomery County Correctional Facility/Business Office Manager*, 870 F.3d 144 (3d Cir. 2017) (Smith, C.J.) (dismissing prisoner's appeal to move in forma pauperis after clarifying application of three strikes rule).

*Prisoner Retaliation*

*Oliver v. Roquet*, 858 F.3d 180 (3d Cir. 2017) (Krause, J.) (reversed and remanded) (clarifying elements of First Amendment retaliation claim under *Rausser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001) and what a committed plaintiff must plead to show that protected activity was a "substantial or motivating factor" in defendant's actions).

*Sixth Amendment – Confrontation Clause*

*Lambert v. Warden Greene SCI*, 861 F.3d 459 (3d Cir. 2017) (Ambro, J.) (affirmed in part, vacated in part, remanded) (concluding that trial court's violation of defendant's rights under the Sixth Amendment's confrontation clause excused procedural default).

*Sixth Amendment - Ineffective Assistance of Counsel*

*Bey v. Superintendent Greene SCI*, 856 F.3d 230 (3d Cir. 2017) (McKee, J.) (vacated and remanded) (excusing defendant's procedural default because post-conviction counsel was ineffective by failing to raise claims on collateral attack).

*McKernan v. Superintendent Smithfield SCI*, 849 F.3d 557 (3d Cir. 2017) (Roth, J.) (reversed and remanded) (issue of first impression) (granting

habeas petition after concluding that counsel's failure to recognize judge's lack of impartiality constituted ineffective assistance of counsel, and holding that "right to an impartial trial extends to a bench trial, and that such right cannot be waived by a defendant").

*Vickers v. Superintendent Graterford SCI*, 858 F.3d 841 (3d Cir. 2017) (Krause, J.) (reversed and remanded) (holding that "where a defendant has been apprised of his basic right to a jury trial, counsel's failure to inform him of certain aspects of that right does not give rise to structural error," modifying *United States v. Lilly*, 536 F.3d 190 (3d Cir. 2008)).

### *Sentencing*

*United States v. Douglas*, 849 F.3d 40 (3d Cir. 2017), rev'd and remanded after hearing en banc, 885 F.3d 124 (3d Cir. 2018) (reevaluated circumstances under which U.S.S.G. § 3B1.3 sentencing enhancement applies).

*United States v. Ferguson*, 876 F.3d 512 (3d Cir. 2017) (Hardiman, J.) (affirmed) (finding court did not commit plain error by mentioning arrest record in determining defendant's sentence).

*United States v. Graves*, 877 F.3d 494 (3d Cir. 2017) (Roth, J.) (issue of first impression) (concluded that "generic federal robbery is defined as it is in the majority of state robbery statutes, without the requirement of more than de minimis force.").

*United States v. Jackson*, 862 F.3d 365 (3d Cir. 2017) (Cowen, J.) (joining the Fifth, Eighth, and Tenth circuits to adopt an "elements-based approach" to determine how to sentence a defendant whose conviction does not have a promulgated guideline and remanding for resentencing) (McKee, dissenting) (arguing that the district court's sentences were appropriate) (issue of first impression).

*United States v. Ley*, 876 F.3d 103 (3d Cir. 2017) (Fisher, J.) (vacated and remanded) (issue of first impression) (holding that for purposes of U.S.S.G. § 4A1.2(a)(2), "an arrest is a formal, custodial arrest" and concurring with the Sixth, Ninth, and Eleventh Circuits).

*United States v. Martin*, 867 F.3d 428 (3d Cir. 2017) (Hardiman, J.) (affirmed) (issue of first impression) (joining the Second and Ninth Circuits to hold that even if a plea agreement stipulates to sentencing the defendant to a lower guideline range, the appropriate guideline range is that which is determined by the court, and accordingly, affirming district court's denial of defendant's motion for a sentence reduction under 18 U.S.C. § 3582(c)(2)).

*United States v. Mateo-Medina*, 845 F.3d 546 (3d Cir. 2017) (McKee, J.) (vacated and remanded) (holding district court committed plain error by impermissibly considering defendant's arrest record when those arrests did not result in convictions).

*United States v. Poulson*, 871 F.3d 261 (3d Cir. 2017) (Rendell, J.) (affirmed in part, vacated in part, remanded) (issue of first impression) (join-

ing Seventh and Eighth Circuits to find that “substantial financial hardship” component of U.S.S.G. § 2B1.1(b)(2)(A)–(C) is subject to a district court’s discretion during sentencing).

*United States v. Rodriguez*, 855 F.3d 526 (3d Cir. 2017) (Restrepo, J.) (affirmed) (holding that appellate court had jurisdiction under 28 U.S.C. § 1291 to review district court’s discretionary denial of defendant’s motion for a sentencing reduction under 18 U.S.C. § 3582(c)(2)).

*United States v. Steiner*, 847 F.3d 103 (3d Cir. 2017) (Fuentes, J.) (affirmed in part, vacated in part, remanded) (issue of first impression) (concluding that under the categorical approach, “a conviction under the Pennsylvania burglary statute in question is not a predicate § 4B1.2 ‘crime of violence’”).

#### *Sufficiency of the Evidence*

*United States v. Ferrero*, 866 F.3d 107 (3d Cir. 2017) (Scirica, J.) (affirmed) (affirming defendant’s conviction, forfeiture, and sentence based on violations of the Travel Act, 18 U.S.C. § 1952, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c), and the federal wire fraud statute, 18 U.S.C. § 1343).

*United States v. Repak*, 852 F.3d 230 (3d Cir. 2017) (Smith, J.) (affirmed) (affirming defendant’s extortion and bribery convictions and sentence in light of various challenges to evidentiary matters).

#### Supervised Release

*United States v. Azcona-Polanco*, 865 F.3d 148 (3d Cir. 2017) (Restrepo, J.) (affirmed) (holding that the district court must explain with requisite specificity why it decides to impose a term of supervised release upon a deportable immigrant under U.S.S.G. § 5D1.1).

*United States v. Johnson*, 861 F.3d 474 (3d Cir. 2017) (Fuentes, J.) (affirmed) (issue of first impression) (joining Second and Fifth Circuits to hold that when a court revokes a term of supervised release for one conviction, that revocation does not terminate supervised release for a separate conviction).